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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 202

MRS. WALTER E. VON KALINOWSKI,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

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IN THE

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MRS. WALTER E. VON KALINOWSKI,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

Petitioner, Mrs. Walter E. von Kalinowski, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on November 2, 1960.

Citations to Opinions Below.

The memorandum opinion and findings of the commissioner are unreported and are printed in Appendix B hereto, *infra*, p. 4. The opinion of the Court of Claims, printed in Appendix C hereto, *infra*, p. 43, is not yet officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered on November 2, 1960. Appendix C, *infra*, p. 43. Rehearing was denied April 7, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1255(1).

Questions Presented.

(1) Whether, in Court of Claims cases determined under 28 U. S. C. A., Section 1491(1) through (3), the *extent* of liability of the United States should be ascertained in accordance with some special rule applicable only to itself, or in accordance with the law governing comparable conduct by private persons; i.e., the law of the place where the act or omission occurred.

(2) Whether, if a special federal rule is to be applied to such actions against the United States,[1]

(a) the measure of damages for conversion of property whose value has fluctuated is the value at the time of the conversion, or the highest intermediate value between then and the time of trial;

(b) the measure of damages for conversion of property shall take into consideration the diminishing power of the dollar, and permit the award of damages according to the current value of the dollar;

(c) the measure of damages for conversion of property which has a special value to the owner should include that special value.

Statutes Involved.

The statutory provisions directly involved are in subsections (1) through (3) of Section 1491, 28 U. S. C. A. Section 1491 is printed in full in Appendix A, *infra*, p. 1.

Also relevant, although not directly involved, are the following statutes, which are also printed in Appendix

[1]If the Court were to decide the first question in accordance with our contentions herein, it would not reach the second question. Sub-question (2)(c) is raised herein solely to preserve the point in the event certiorari should be granted.

A, *infra:* Act of March 15, 1958, Pvt. Law 85-364, 72 Stat. A15 (conferring jurisdiction on the Court of Claims to hear, determine and render judgment upon this claim); and 28 U. S. C. A., §§1346(b), 2674.

Statement.

This action was brought below pursuant to a special jurisdictional act authorizing the Court of Claims to hear, determine and render judgment of petitioner's claim for the value of certain jewels and other effects, which were brought by her into the United States from Germany in 1928 and were sold by respondent's New York customs authorities at a customs auction in 1931 for nonpayment of duty.[2] The lower court construed this Act to mean that it could render judgment only "if the defendant is found to be legally liable" under that Court's "standard jurisdiction" (App. C, *infra*, p. 44), *i.e.*, under 28 U. S. C. A., §1491(1) through (3).

On the merits, the lower court went on to hold that respondent's failure to give personal notice of the time and place of the sale, even though the customs officials were aware of petitioner's address and of her anxiety to redeem the property, constituted a failure to comply with the legal prerequisites to a sale of the property in question, as established by the applicable statutes and customs regulations (App. C, *infra*, p. 53), as well as a

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[2]Act of March 15, 1958, Pvt. Law 85-364, 72 Stat. A15. The necessity for the special act arose out of the fact that the claim was otherwise barred by the statute of limitations [28 U. S. C. A. § 2501], which Congress expressly waived because of ". . . the continuous efforts made by the claimant to obtain relief from the Government in a series of actions beginning in December of 1928 and extending down through the period when the first steps were taken to petition for relief from Congress." Sen. Rep. No. 1125, 85th Congress, 1st Session.

probable violation of the constitutional due process requirements laid down by *Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306. (App. C, *infra*, p. 52). It concluded that such wrongful conduct had the necessary effect of invalidating the sale and exposing respondent to liability for damages flowing naturally from the breach. (App. C, *infra*, p. 53.)

In this regard, the Court of Claims found as fact that the fair market value of the property was $8,125.72, as of the date of the wrongful sale in October, 1931. (App. C, *infra*, p. 80.) It awarded judgment in that amount (App. C, *infra*, p. 80), even though it also found that the fair market value of jewelry in 1931 was about one-half of that in 1959, the time of trial. (App. C, *infra*, p. 76.)

The conduct of respondent's agents, in wrongfully disposing of petitioner's property, is equivalent to the tort of conversion. Throughout the proceedings below, petitioner contended that the law governing the measure of damages flowing from such conduct should be the law of the place of the wrong (*i.e.*, New York), and that under the law of New York the plantiff may, where as here the property has fluctuated in value, recover the highest intermediate value of the property between the time of a conversion and the time of trial.[3]

Though neither of these propositions was controverted by respondent below, the court awarded as damages only the value of the property at the time of conversion even though it expressly found that the value of the property was twice that amount at the time of trial. In arriving at this conclusion without a discus-

[3]See Petitioner's Brief (at pp. 69-70) and Motion for Rehearing (at pp. 17-18).

sion of the governing rules of law, the lower court implicitly decided, *sub silencio*, that the rules of law governing the conduct of private individuals were inapplicable to actions against the United States; that, as to the latter, it could fashion its own rule; and that under such rule petitioner was limited to damages in an amount equal to the value of the property at the time of the conversion. In like fashion, it refused to consider, in its measure of damages, the diminishing power of the dollar and the special value of the property to petitioner.

Reasons for Granting the Writ.

1. In Deciding That the United States Is Not Subject to the Law Governing Individuals, the Court Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should be, Settled by This Court.

There can be little doubt that had this litigation been between private persons, the law of New York would have been applicable, and that petitioner would have been awarded a judgment thereunder in an amount equal to the highest intermediate value between the time of conversion and the time of trial. The rule of "highest replacement value" was first conceived by the New York courts, which have applied it to innocent conversions of stock by a good faith wrongdoer. *Wright v. Bank of the Metropolis* (1888), 110 N. Y. 237, 18 N. E. 79 (the leading New York case with respect to stock conversion). However, in actions for conversion which do not involve such stock transactions, New York adheres to the rule that the measure of damages is the highest market price which the property might have had to the date of trial.

Plymouth Rubber Co. v. Knott (1921), 187 N. Y. S. 914, involved an action for conversion of rubber goods. Between the time of the conversion and the time of trial, the price of the goods advanced. The court said:

> "The *regular rule of damages* in an action for conversion is applicable to this case, that for a wrongful conversion of property *where there is a rise in the value of the chattel after the conversion,* the plaintiff may recover the *highest intermediate value* between the time of the conversion and the time of the trial. Romaine v. Van Allen, 26 N. Y. 309; Burt v. Dutcher, 34 N. Y. 493; Scott v. Rogers, 31 N. Y. 676; Groat v. Gile, 51 N. Y. 442. . . ." (187 N. Y. S., *supra,* at 916-917.) [Emphasis added.][4]

The question is whether the United States is to be subject to the same rule as would an individual defendant, or whether it is to be the subject of special rules, fashioned only for itself.

Regardless how this Court should resolve this question, it has an overwhelming significance which goes far beyond the confines of this case. It arises under the basic jurisdictional statute of the Court of Claims (28 U. S. C., §1491); it covers three of the five classes of cases over which that court is thereby given jurisdiction; and it necessarily arises in every case in which the plaintiff is successful. As shown below, the question has in slightly different contexts been the subject of an immense amount of study, both by the courts and by Congress.

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[4]Emphasis is added throughout, unless otherwise specified.

The need of an opinion by this Court on the question is emphasized by the fact that there is no other appellate review of decisions of the Court of Claims. *Cf. United States v. Blair*, 321 U. S. 730; *United States v. Moorman*, 338 U. S. 457.

2. In Deciding That the United States Is Not Subject to the Law Governing Individuals, the Court Below Has Decided an Important Question of Federal Law Which Is in Conflict With Analogous Decisions of This Court, and of Several Courts of Appeal, and With National Public Policy as Announced by Congress in the Federal Tort Claims Act.

As presented in this case, the question of the applicable rule of law governing measure of damages arises in the context of governmental violations of constitutional, statutory and administrative law. While to the best of our research that precise question has never before been decided by this Court or by any Court of Appeals, it is highly analogous if not identical to the question presented by the measure of damages from governmental wrongs in other areas of the law. Specifically, this question has arisen and has been decided with respect to breaches of contract by the United States (jurisdiction over which is given the Court of Claims by 28 U. S. C. A. §1491(4)), and under the Federal Tort Claims Act (as reflected in 28 U. S. C. A., §§1346(b), 1504).

Under Section 1491(4), the Court of Claims is given jurisdiction

> ". . . to render judgment upon any claim against the United States: * * * (4) Founded upon any express or implied contract with the United States; * * *"

This section and its predecessors have always been construed by this Court to mean that the liability of the United States is to be determined in accordance with the law governing similar liability of private persons. *Smoot's Case*, 82 U. S. (15 Wall.) 36; *United States v. Smith*, 94 U. S. 214, 217; *United States v. Barlow*, 184 U. S. 123, 130; *Reading Steel Casting Co. v. United States*, 268 U. S. 186, 188.

It is true that none of these cases discusses the question of whether local law or "federal common law" is to be applied in making this determination. This is explainable, however, by the fact that they were all decided prior to *Erie R. Co. v. Tompkins*, 304 U. S. 64, at a time when the courts were under the impression that such a "federal common law" existed. However, that case decided that in private suits based upon diversity of citizenship (which, of course, is the only way in which the federal courts could obtain jurisdiction to decide such questions), the federal courts are obligated by the Constitution to apply the "local", *i.e.*, State, case law. "There is no federal genaral common law." 304 U. S., *supra*, at 78. Thus, if the liability of the United States is to be the same as that of private persons, it of necessity must be determined by so-called "local" law.

The question has also arisen in the context of the Federal Tort Claims Act, which gives to the district courts jurisdiction over certain types of tort claims

> ". . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." [28 U. S. C. A. §1346(b).]

Thus, Congress has established a national policy to the effect that the Government is to be treated no differently than private citizens when it comes to tortious conduct. The parallel between tortious conduct and conduct in violation of constitutional, statutory and administrative law (as in the question under consideration) is so striking that this point alone would seem to dictate that a similar policy be followed in each case.

It will be noted that the express language of the section quoted above speaks only of the determination of the *existence* of liability of the United States. In 28 U. S. C. A., §2674, however, Congress has made clear that local law is also to be applied to determine the *extent* of liability.[5] For cases illustrating this application, see, *e.g., United States v. Sutro* (9th Cir., 1956), 235 F. 2d 499; *United States v. Brooks* (4th Cir., 1949), 176 F. 2d 482. See also *Hatahley v. United States*, 351 U. S. 173, 182 (*dictum*).

Thus, in every context in which the question has arisen, Congress, this Court and the lower federal courts have all decided that the United States shall fare no better and no worse than would a private individual under similar circumstances. It is submitted that the lower court's decision in the instant case is thus in conflict with each of these analogous authorities, and should be reversed. If this Court should agree, then the following Reasons for Granting the Writ will become moot.

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[5]Exclusive of punitive damages and interest. 28 U.S.C.A., § 2674.

3. If a Special Federal Rule is to be Fashioned for Such Actions Against the United States, Then the Lower Court, in Limiting Petitioner's Recovery to the Value of the Property at the Time of Its Conversion, Has Decided an Important Federal Question in a Way in Conflict With the Decisions of This and Other Courts.

As shown above, we think the measure of damages[6] should be applied in accordance with the law of the place where the wrong occurred. If, however, special rules are to be fashioned for such cases, the nature of those rules is obviously an extremely important question of federal law.

Treated as such, the lower court's decision (in limiting petitioner's recovery to the value of the property at the time of conversion, even though its value had doubled by the time of trial) is in conflict with the decisions of this and other courts.

It is a well-recognized principle of law that where property which has been converted has increased in value, the owner thereof is entitled to recover as damages its highest market or intermediate value. This rule has been followed by this Court since 1888. In *Galigher v. Jones* (1888), 129 U. S. 193, 200, the Court adopted this rule with respect to the conversion of stock, and said that to allow damages as of the date of conversion would "*afford a very inadequate remedy*" to place the injured party in the same position as if his rights had not been violated.

This rule applies not only to actions for conversion of stock but of any personal property which has in-

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[6]In cases against the United States for pecuniary damage resulting from violations of constitutional, statutory or administrative law.

creased in value. See *2 Sedgwick on Damages* (9th ed. 1912), §507, p. 991; *Rest. Restitution*, §151, where it is expressed as follows:

> "Where a person is entitled to a money judgment against another because by . . . consciously tortious conduct the other has . . . disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper . . . disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value. . . ."

This rule is merely an application of the doctrine of consequential damage. It seeks to avoid injustice and compensate the injured party in an amount sufficient to indemnify him for the *natural, reasonable and proximate result* of such conversion and which proper prudence could not have averted. *2 Sedgwick on Damages* (9th ed. 1912), §525a, p. 1028:

> "At the end we reach what may be called the *only general modern rule*, the value of the property or property rights lost, with interest; *increased by special circumstances within the limits fixed by the rules governing consequential damages*, and limited by the rule of avoidable consequences. . . ."

See, to the same effect, *4 Sutherland on Damages* (4th ed. 1916), §1119, p. 4243.[7]

In applying this fundamental principle, modern courts have developed the general principle that *the plaintiff*

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[7]This rule has been codified in California, as well as other states, as the measure of damages for conversion. Cal. Civil Code, § 3336.

may recover the highest intermediate value between the time of conversion and the time of trial. See 2 *Sedgwick on Damages* (9th ed. 1912), §507, p. 991, where it is stated:

> "It has been held by many courts of high authority that in actions for the conversion, not only of stock, but of any *personal property of fluctuating value,* the measure of the damages *is the highest market price* which the property may have had from the *date of the conversion to the end of the trial,* provided the action be brought and pressed with due diligence."

See also *Plymouth Rubber Co. v. Knott* (N. Y. 1921), 187 N.Y.S. 914, 917; *Friedman v. Renz* (Cal. App. 1939), 87 P. 2d 386, 387; *cf. Logan County Bank v. Townsend,* 139 U. S. 67, 78, (dictum); cases cited *Anno.* 40 A. L. R. 1283, 1286; 87 A. L. R. 817, 818; 53 Am. Jur., *Trover and Conversion,* §99, p. 891.

Under certain circumstances, the courts have limited the damages to the highest replacement value which the converted commodity reached in the market within a reasonable time after the plaintiff became aware of the conversion. This rule has been applied primarily to stock and bond cases between broker and principal, and assumes that the plaintiff, in the exercise of a proper degree of prudence, would have replaced the stock by purchasing a like commodity.[8] *Galigher v. Jones, supra* (1888), 129 U. S. 193, 200 (stock conversion); *Wright v. Bank of the Metropolis* (1888),

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[8]The basis for limitation of recovery under the rule of "highest replacement value" is predicated upon the doctrine of avoidable consequences. 12 N.Y.U.L.Q. 240, 243; *Wright v. Bank of the Metropolis, supra* (1888), 18 N.E. 79.

110 N.Y. 237, 18 N.E. 79. 53 Am. Jur., *Trover and Conversion*, §99, p. 891; *McCormick on Damages*, §48, pp. 188-189; *Rest. Torts*, §927, Comment (c), p. 650.

The law of New York has already been discussed, *supra*, pp. 5-6. In *Friedman v. Renz*, *supra*, the California courts in applying the doctrine of consequential damages to actions for conversion, have likewise followed the New York rule of highest intermediate value. There, the court said:

> "In so far as the same is applicable here, Civil Code, §3336, as amended by St. 1931, p. 1358, provides that the recoverable damages for a conversion of personal property is presumed to be the value of the property at the time of the conversion with interest, or such sum as will indemnify for the natural, reasonable and proximate result of such conversion and which a proper prudence could not have averted. In a proper case, and where the property in question is of a fluctuating value, the recovery of the highest market value therefore *between the date of the conversion and the trial of the action will doubtless be the measure of damages*, providing one seeking damages has acted with reasonable diligence."[9]

Accordingly, under the circumstances of this case, the applicable rule would be that of *highest* intermediate market value between the date of conversion and the time of the trial in the Court of Claims.[10]

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[9]87 P.2d, *supra*, at 387.

[10]It is obvious that the doctrine of avoidable consequences does not apply here. Plaintiff could not have replaced the unique property involved here by purchasing like commodities in the

In the analogous case of *Isenberg v. Trent Trust Co.* (9th Cir. 1929), 31 F. 2d 553, 555, the reasoning of the court is particularly apropos. In that case, the beneficiary of a trust sued a trustee for failure to institute proceedings for the recovery of certain stock. As a result of the trustee's failure, the stock was sold by the Alien Property Custodian and the trial court held that the beneficiaries were entitled to a restoration in kind or the value of the stock at the trust's termination, rather than at the time of conversion, together with interest and accrued dividends. The Ninth Circuit held that this measure of damages was proper and stated that the rule limiting damages to a reasonable time after the injured party had notice of the default was inapplicable. It stated:

> ". . . Furthermore, the widow could hardly be required to purchase stock, in order that she might enjoy the income during her life, or the heirs to purchase stock, in order that they might enjoy the income after the death of the widow. . . ."

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open market, even if plaintiff and her husband were financially able to do so (which the evidence shows they were not; see Fdg. 9, App. C, *infra*, p. 61). Indeed, the record shows that attempts were made to trace the property, to no avail (see Fdg. 12, App. C, p. 67). Moreover, the Congress, in enacting the Special Bill, explicitly recognized that plaintiff has not slept on her rights and had acted with diligence (S. Rep. No. 1125, p. 2, 85th Cong., 1st Session).

Further, the property in question was not commercial in nature and was being held by plaintiff as family heirlooms to be retained in the family for that reason (Fdg. 7, App. C, p. 59).

4. If a Special Federal Rule is to be Fashioned for Such Actions Against the United States, Then the Lower Court, in Refusing to Consider the Diminishing Power of the Dollar by Granting Recovery According to the Current Value of the Dollar, Has Decided an Important Question of Federal Law Which Has Not Been, but Should be, Settled by This Court.

For reasons already set forth, the federal rule governing measure of damages in such cases as this (if there is to be such a rule) is extremely important. In this regard, this Court has not spoken on the question whether such a rule should take into consideration the diminishing power of the dollar so that the judgment awards damages according to the present-day value of the dollar.

The lower court's implicit answer to this question (which was fully briefed and argued below[11]) is at odds with the prevailing American viewpoint.

The fundamental concept of damages is compensation for a wrong. The basic theory of damage is to restore the injured person as nearly as possible to the position he would have been in had it not been for the wrong of the other party. *United States v. Hatahley* (10th Cir. 1958), 257 F. 2d 920, 923; *cert. den.* 358 U. S. 899.

Compensation means compensation in value. The value of money lies in its purchasing power. Money

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[11]See Petitioner's Brief on the Law and the Facts, pp. 63-70; and Motion for Rehearing, pp. 9-13.

is merely a medium of exchange. As pointed out in 15 Am. Jur., *Damages*, §204, at p. 621:

> ". . . It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy. . . ."

Accordingly, in tort cases both federal and state courts have taken judicial notice of the diminishing purchasing power of the dollar and have held that the amount of damages is to be computed according to the current value of the dollar. See *Anno.*, Damages, Increased Cost of Living, 12 A.L.R. 2d 614, and numerous cases cited therein.

Gist v. French (Cal. App. 1955), 288 P. 2d 1003, 1020, aptly illustrates this rule. There the court said:

> ". . . It is plain common sense and simple honesty for a court or a jury in appraising the damages suffered by reason of any tortious act of defendant to compute the amount of damages according to *the current value of the dollar.* (Burke v. City & County of San Francisco, 111 Cal. App. 2d 314, 320, 244 P. 2d 708; Duvall v. T. W. A., 98 Cal. App. 2d 106, 111, 219 P. 2d 463; 12 A. L. R. 2d 611, 645, annotation.) *The dollar is merely a medium of exchange. Its value is fixed by the current values of things that are bought and sold.* Hence, in appraising the loss suffered by reason of the act of a tortfeasor, its value should be determined by the current value of the dollar in the commercial world."

Butler v. Peluso (Cal. App. 1957), 317 P. 2d 57, 60, emphasizes the universal application of this rule as follows:

> "That the economic conditions of the state and the value of the dollar at the time of the verdict should be considered by the jury in appraising the value of the detriment suffered by the plaintiff *is too well established to require citation of authorities.* . . ."

And in *Butler v. Allen* (Cal. App. 1946), 167 P. 2d 488, 490, the court applied this rule in an action for wrongful eviction, and loss of, or damage to, a tenant's personal effects.

This Court can, of course, take judicial notice that the purchasing power of the dollar has decreased to approximately 50% of what it was in October, 1931.[12] *Todd Shipyards Corporation v. The City of Athens* (D. C. Md., 1949), 83 Fed. Supp. 67; *Howard v. Baltimore & O. C. T. R. Co.* (Ill., 1945), 63 N. E. 2d 774; *cert. den.* 328 U. S. 867 (Federal Employers' Liability and Safety Appliance Act); *Haselden v. Atlantic Coastline R. Co.* (S. C., 1949), 53 S. E. 2d 60; *cert. den.* 338 U. S. 825 (Federal Employers' Liability Act); *Kircher v. Atchison, T. & S. F. Ry. Co.* (Cal. 1948), 195 P. 2d 427, 434.

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[12]See Consumer Price Index, U.S. Bureau of Labor Statistics, monthly release May, 1959, and monthly Labor Review, U.S. Bureau of Labor Statistics. The exact amount of the decrease is 48.62% as to all items.

Thus, in *Kircher v. Atchison, T. & S. F. Ry. Co., supra,* 195 P. 2d 427, 434, in considering whether or not the verdict was excessive, the Court said:

> ". . . It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral [citations], and the *trier of the fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained as the result of the injuries suffered.*"

However, notwithstanding the universal acceptability of this rule, the lower court failed to apply it in the instant case. It assessed damages based upon *1931* valuation without any regard to the fact that the purchasing power of the dollar has since diminished approximately 50%. It can hardly be said that petitioner is being made whole since she is not being *compensated* in *value*. Actually, she would receive under the present judgment only one-half of the value of the property as established by the lower court, as determined by the current value of the dollar in the commercial world.

5. The Lower Court Erred in Failing to Assess Damages Based Upon the Special Value of the Property to Petitioner Because of Their Historical Significance as Family Heirlooms, and Other Consderations.

As mentioned in Footnote 1, *supra,* at p. , we raise this issue merely to preserve the point should certiorari be granted. The question arises out of the fact that the property in question consisted of family heirlooms [Fdg. 7, App. C, p. 59] which were obviously of much

greater value to petitioner and her family than would be reflected in "fair market value."

The authorities are thoroughly analyzed in petitioner's briefs below,[13] but an apt summary of the law is contained in the Restatement of Torts, §911, comment (e), and at §927, comment on clause (a), which provides:

> "c. *Value.* As stated in §911, 'value' includes market value and value to the owner. A person tortiously deprived of property is entitled to damages *based upon its special value to him if that is greater than its market value.*"

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIAN O. VON KALINOWSKI,
Counsel for Petitioner.

Date: June 30, 1961.

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[13]Plaintiff's Brief on the Law and the Facts, pp. 55-63, and Motion for Rehearing, pp. 21-28.

APPENDIX A.

Statutes Involved.

28 U. S. C. A.

"*§1491. Claims against United States generally*

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

"(1) Founded upon the Constitution; or

"(2) Founded upon any Act of Congress; or

"(3) Founded upon any regulation of an executive department; or

"(4) Founded upon any express or implied contract with the United States; or

"(5) For liquidated or unliquidated damages in cases not sounding in tort. June 25, 1948, c. 646, 62 Stat. 940."

"*§1346. United States as defendant*

". . .

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of

his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

". . .

"§2674. *Liability of United States*

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries, resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

Act of March 15, 1958, Pvt. Law 85-364, 72 Stat. 415

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That notwithstanding any statute of limitations or lapse of time or any limitation upon the jurisdiction of the United States Court of Claims to hear, determine, and render judgment on claims against the United States,

jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Mrs. Walter E. von Kalinowski. Suit upon such claim may be instituted by Mrs. Walter E. von Kalinowski at any time within three years after the date of enactment of this Act.

"Sec. 2. The provisions of sections 1492 and 2509 of title 28, United States Code, shall be applicable to this Act.

"Approved March 15, 1958."

APPENDIX B.

Opinion and Findings of Fact of Commissioner.

(Not yet officially reported.)

In the United States Court of Claims.

No. 234-58. (Filed Dec. 18, 1959.)

Mrs. Walter E. von Kalinowski v. The United States.

OPINION AND FINDINGS OF FACT OF COMMISSIONER.

To the honorable the Chief Judge and Associate Judges of the United States Court of Claims:

The following findings of fact, opinion and conclusion of law are submitted under the order of reference and the order of the court issued pursuant to Rule 45:

OPINION OF THE COMMISSIONER.

The plaintiff is before the court by virtue of a special jurisdictional act authorizing the court to hear, determine, and render judgment on her claim for the value of certain jewelry and other effects which were brought by her into the United States from Germany in 1928 and were sold at a customs auction in 1931 for nonpayment of duty. At the outset it is observed that section 2 of the jurisdictional act contains the novel direction that sections 1492 and 2509 of title 28, United States Code, "shall be applicable to this Act." Section 1492 of title 28 empowers the court "to report to either House of Congress on any bill referred to the court by such House," and section 2509 directs that such report to either House shall contain, in addition to the facts of the claim, "conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally

or equitably due from the United States to the claimant." The plaintiff urges that the unorthodox language of the act means that the court is to render judgment on the merits of the claim on either a legal or equitable basis, but the act does not say this. A more logical construction would be that the court is to enter judgment for the plaintiff if the defendant is found to be legally liable, but if there is no legal liability then the court is to report to *each* House of Congress (since the bill initiating the act passed both Houses) any amounts legally or equitably due the plaintiff, including the award of a gratuity if the facts persuade that sort of recommendation. In the past, Congress has had no difficulty in finding explicit language directing the court to exercise equitable jurisdiction if that was desired. See the special acts in Murphy v. United States, 35 C. Cls. 494, United States v. Weil, *et al.*, 35 C. Cls. 42, Lamborn and Co. v. United States, 100 C. Cls. 703, and Burkhardt, *et al.*, v. United States, 113 C. Cls. 115. The court cannot safely assume powers in excess of its standard jurisdiction in the absence of a clear and unambiguous mandate.

The plaintiff rests her case in general on the dual propositions that the property which was sold to satisfy customs duty was of a character properly exempt from duty, and that the sale was void because of material procedural defects. The defendant denies these contentions and maintains in addition that the plaintiff was not the owner of the property.

Turning to the plaintiff's first premise, that the property was exempt from duty, this in turn rests on the theories that it was inherited, that it consisted of articles of personal adornment and household effects made

exempt by statute, and that the defendant is estopped from claiming that the property was dutiable because the plaintiff had relied to her detriment on erroneous advice given her by American consular officials in Germany prior to importation of the property. Even if the defendant's consular officials in Germany had so advised the plaintiff prior to her departure from Germany, and this is indicated only by plaintiff's unverifiable asseverations of oral conversations she had in 1928 with the said officials, the defendant would not be estopped from repudiating the advice if it was in error. Utah Power & Light Co. v. United States, 243 U.S. 389, 409; United States v. San Francisco, 310 U.S. 16, 31; Commissioner of Internal Revenue v. Duckwitz, 68 F. 2d 629; Fleming v. Miller, 47 Fed. Supp. 1004.

Inherited property is not, as plaintiff contends, exempt *per se* from duty under the law. The relevant "free list" of imports appears in Title II of the 1922 Tariff Act (42 Stat. 922-934) and does not even by indirection infer that inherited property or heirlooms are free of duty. It may be true that duties are primarly aimed at articles imported for sale (Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 686), that merchandise subject to duty is intended to embrace only merchandise in a commercial sense (United States v. Mattio, 17 F. 2d 879), and that doubts or ambiguities as to a tax should be resolved in favor of the importer (Erskine v. United States, 84 F. 2d 690, 691; United States v. Wigmore, 48 F. Supp. 250, 252), but rewriting the free list as plaintiff impliedly wants is the prerogative of Congress, not the court.

Paragraph 1695 of the 1922 Tariff Act (42 Stat. 932) exempted from duty "wearing apparel, articles of

personal adornment, toilet articles and similar personal effects of persons arriving in the United States," and, in proviso at the bottom of the paragraph, added "That up to but not exceeding $100 in value of articles acquired abroad by such residents of the United States for personal or household use or as souvenirs or curios, but not bought on commission or intended for sale, shall be admitted free of duty." It is clear (if not plainly expressed) that the blanket exemption provided by the paragraph in question applies only to non-residents temporarily sojourning in this country, and that returning United States residents are exempt only up to $100 in value of the imported articles they acquired abroad. United States v. Dessin, 13 Ct. Cust. App. 28; United States v. Mattio, 17 F. 2d 879, 880. The ancestrally related provisions of the 1909 and 1913 Tariff Acts have also been so interpreted by the Court of Customs Appeals in Bradley Martin, Jr., v. United States, 1 Ct. Cust. App. 134, T.D. 31185; Bache v. United States, 4 Ct. Cust. App. 414, T.D. 33852, and Thompson v. United States, 5 Ct. Cust. App. 343, T.D. 34534. Astor v. Merritt, 111 U.S. 202, relied upon by plaintiff to show the contrary, interpreted section 2505 of the Revised Statutes of 1878, the "free list" of that day, which was substantially different from related provisions of the 1909, 1913 and 1922 Tariff Acts and so the authority is inapposite. The editor's arrangement of subparagraphs 1798 (b) and (c) of title 19, United States Code, itself clearly demonstrates the scope of the exemption provided by the 1922 and succeeding Tariff Acts. The plaintiff would further read into the words "acquired abroad" as they are used in the proviso to the 1922 tariff paragraph cited above the restrictive

meaning "purchased abroad," but the term as used seems to cover acquisitions in general whether by purchase, gift, inheritance or otherwise. The method of acquisition is merely a circumstance which does not control the question of duty so far as the statute discloses. The statute says what it means, and no need exists for interpretation of the legislative intent where there is no ambiguity.

Among the items imported by the plaintiff's late husband were an ornamental bronze jewel box, a gold-plated silver strainer, and nine gold-plated silver Mocha spoons, each of the latter containing an embedded small gold coin. Paragraph 1931, section 201, of the 1922 Tariff Act (42 Stat. 925) exempted from duty "* * * usual and reasonable furniture, and similar household effects of persons or families from foreign countries if actually used abroad by them not less than one year, and not intended for any other person or persons, nor for sale." Under an earlier version of this same provision which omitted the word "similar" (§2505 Revised Statutes, 2d. ed 1878, p. 489) the Supreme Court ruled in Arthur v. Morgan, 112 U.S. 495, that a carriage in use abroad by its owner, an American citizen, for more than one year, was entitled to exemption from duty as being included in "household effects." Although the earlier statute was slightly more liberal than the one under discussion, it nevertheless appears that spoons, strainers and jewel boxes are readily classifiable as "usual and reasonable furniture, and similar household effects." Article 382 of the Customs Regulations extends the exemption to nationals as well as aliens, and also recites that "Households effects used abroad not less than one year in a family of which the importer

was a member may be passed free of duty, although the importer did not own the effects at the time of use." The household effects in question were in the family of Dr. von Kalinowski's mother for a considerable period while he was presumably an in-dwelling member of that family. Obviously the duty levied on the spoons, strainer and jewel box was not sanctioned by the applicable law and regulations.

The second phase of plaintiff's argument, that the sale of her property was void due to technical deficiencies, is of greater merit in part. This divides itself into the main charges that plaintiff relied to her detriment on defendant's erroneous advice that she had three years from the date of importation in which to redeem the property and so the defendant is estopped from repudiating the advice, that constitutional due process was violated when the defendant sold the property to satisfy unpaid duty without giving the owner personal notification of the time and place of sale, and that the notice by publication did not comply with the Customs Regulations of 1923. The first of these charges can be disposed of without reference to estoppel. In September 1929 the plaintiff admittedly knew that the time for her to redeem the property which had been imported the preceding November would soon expire, for at that time she requested the Commissioner of Customs to grant an extension, and an extension of six months to April 1930 was granted. In October 1930 another six months' extension was granted to April 1931, pursuant to Dr. von Kalinowski's letter requesting extra time and in which letter he also asked the Assistant Collector for his advice regarding information given him by a customs official

to the effect that unclaimed parcels are sold after being held for three years. The record contains no evidence that the Assistant Collector ever responded to this inquiry by Dr. von Kalinowski for advice as to the three-year holding period, beyond merely granting another six months' extension for redemption. The plaintiff would have the defendant estopped by its silence in not responding, but this would not apply under either the facts or the law, as will be seen. In March 1931 the plaintiff requested still another six months' extension and, in his letter to the plaintiff of April 8, 1931, granting an extension to October 8, 1931, the Assistant Collector of Customs put plaintiff on notice that "it will be impossible to extend this time any further." [illegible] that the plaintiff was gulled by the defendant's failure to answer her husband's inquiry of the preceding year regarding the applicability of a three-year holding period, or to believe that the plaintiff did not know that the property would be subject to sale after October 8, 1931, if it was not redeemed beforehand. At the very least, if she was in doubt she should have sought clarification, which she did not do.

The next point is more nettlesome. The plaintiff knew that auction sales of parcels on which duty was unpaid were held in April and October of each year by the Customs Bureau. She knew that the property would be sold if she did not take steps by October 8, 1931, to redeem it. But she had no actual knowledge of the time and place scheduled for the sale. On October 8, 15 and 22, 1931, there appeared in the New York Herald Tribune and the Journal of Commerce a notice that a public auction would be held on October 29, 1931, at which "unclaimed goods" would be sold.

The notice explained that catalogs were available describing the goods to be sold, that the goods could be inspected at a certain time and place, but did not specify the items to be sold or the names of their owners. The plaintiff was at her home in Missouri and did not personally see the published notice in the New York papers. The plaintiff and the customs officials had engaged in frequent correspondence during the intervening years and the customs officials were aware of her address and of her anxiety to redeem the property.

The adequacy of the notice is in question. Section 491 of the Tariff Act of 1922 (42 Stat. 963) provides as to unclaimed goods:

> If any merchandise of which possession has been taken by the collector shall remain in bonded warehouse or public store for one year without entry thereof having been made and the duties and charges thereon paid, such merchandise shall be appraised by the appraiser of merchandise and sold by the collector at public auction as abandoned to the Government, under such regulations as the Secretary of the Treasury shall prescribe. * * *

Pursuant to this provision the Secretary of the Treasury promulgated Article 927 of the Customs Regulations of 1923, which read in part as follows:

> When the names and address of the consignee can be ascertained from the manifest of the importing vessel, or otherwise, notice of the date of sale should be mailed to him. * * *

Implementing this article, Article 1072 of the Regulations prescribed a form for notice of sale to the importer. The word "should" as used in the quoted portion of Article 927 of the regulations is a loose and

deceptive term. As a breeder of confusion this slippery little word has few peers. The cases disclose its meaning can be, depending on the context of its use, mandatory or directory, imperative or precative, obligatory or discretionary, must or may, and so it goes, a vertiable Yin and Yang diehotomy. See Volume 39 of Words and Phrases, permanent edition, page 31, *et seq.* The party responsible for choosing an ambiguous word should rightly suffer the consequences of its obscurity. In Fegan v. Lykes Bros. S.S. Co., 3 So. 2d, 632, 198 La. 312, where a regulation of the Department of Commerce relating to precautionary operation of certain line-carrying guns and equipment provided that the impelling charge "should" be of certain specifications and provided by the shipowner, the term "should" was held to impose a mandatory requirement of compliance and to be synonymous with "ought", both of which words imply obligation. In other contexts the opposite has frequently been held, so that its meaning requires an analysis of its use in the individual case. In the instant situation if the term "should" as used in the regulation were to be construed so as to connote merely a discretionary performance little need is seen for the regulation, for without it the customs official in charge of the sale would still have authority, if he chose, to mail notices to owners whose property was scheduled for auction. It must be presumed that the regulation sought to accomplish something more than that which could occur permissively in its absence. This view is fortified by the knowledge that Mullane v. Central Hanover Tr. Co., 339 U.S. 306, might have the effect of imposing a constitutional due process requirement of actual rather than substituted notice to the owner under the present circumstances.

It is difficult to understand why the plaintiff, forewarned that she had until October 8, 1931, to redeem the property, did not as the time approached make further inquiries which may have elicited the details of the impending sale. "It is a general rule that whatever puts a person on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding." 66 C.J.S. 642. On the other hand, it is well-established that, because the forfeiture of land to satisfy taxes is considered to be an extremely harsh measure, exact and strict compliance with the statutes must be had at the risk of the sale being void. Thatcher, *et al.*, v. Powell, *et al.*, Lessee, 6 Wheat. 1; Ronkendorff v. Taylor's Lessee, 4 Pet. 349. This philosophy has been held applicable to the forfeiture of imports not declared upon entering the United States (United States v. Mattio, *supra*). Customs duties are commonly held to be a form of tax (Brown v. State of Maryland, *supra*; Pacific Ins. Co. v. Soule, 7 Wall. 433). Logically, one can perceive no reason why the owner of chattels sold for nonpayment of customs duty is under any different or greater criterion of duty to inquire than the owner of land sold for nonpayment of taxes. The owner of property so fixed in situs as land should be even more aware of scheduled forfeiture sales than the owner of free-moving chattels. If tax titles are so notoriously fragile where the niceties of statutory prerequisites have not been observed, the sale of chattels to satisfy unpaid customs duty should be equally vulnerable to procedural defects. The defendant's failure to comply with the legal prerequisites to a sale thus had the necessary effect of invalidating the sale and ex-

posing the defendant to liability for damages flowing naturally from the breach, presupposing the sovereign's consent to be sued.

The final defense to liability is on the ground that the property in suit was owned by Dr. von Kalinowski and not the plaintiff at the time of its detention and subsequent sale, so that the plaintiff is not the proper party in interest. The plaintiff counters this by making a general claim of ownership and, in the alternative, cites authorities to the effect that one who holds merely a right to possession of chattels can maintain an action in damages for their wrongful conversion. 150 A.L.R. 238; 53 Am. Jur. 924. Taking this to be a correct statement of the preponderant view so far as it goes, manifestly a plaintiff could recover no more than the value of his possessory interest. The plaintiff here seeks the total value of the articles allegedly converted, and has given no yardstick to measure the value of a mere possessory interest or usufruct.

The facts do not support a gift *inter vivos* of the property by Dr. von Kalinowski to the plaintiff. Even according full weight to Dr. von Kalinowski's reputed direction to the executor in October 1928 to "Give them [meaning the articles in suit] to her. They are hers now.", and to the naming of the plaintiff as the beneficiary to receive the proceeds of baggage insurance purchased by Dr. von Kalinowski on the eve of the family's return to the United States in 1928, these indications of a donative intent are contradicted effectively by the declaration accompanying the consular invoice containing Dr. von Kalinowski's signature as owner of the property described as "articles of jewelry, gold, silver and laces" which were the "inherited property of Professor Walter von Kalinowski from his

mother." It is true that in subsequent efforts via correspondence and otherwise to redeem the property or secure redress for its loss the plaintiff played the dominant role while her late husband appeared only occasionally. But there is nothing of a positive nature to which plaintiff can point which establishes that a gift had been made to her, or which offsets the clear claim to ownership made by Dr. von Kalinowski upon clearing customs in 1928. To support a gift it is not enough merely to show that the husband tacitly acquiesced in his wife's vigorous efforts to protect the property, or to indulge a presumption that a husband under such circumstances would naturally give inherited jewelry of a feminine style to his wife rather than retain it himself. It may be speculated that the husband made a claim to ownership on the customs declaration simply to expedite entry of the articles without unnecessary complications, but speculation alone is not enough to offset the effect of the act when coupled with the knowledge that the articles were his property through inheritance and remained so until by some affirmative and provable act he gave them to the plaintiff.

If, then, there was no gift *inter vivos*, it must be determined whether the property came into the plaintiff's ownership by operation of law upon the death of her husband. He died intestate on October 12, 1942, at New Orleans, Louisiana, where he had been employed for several years in a teaching capacity and was a permanent resident. Thus, Louisiana was the state of his residence and the laws of that state apply to his estate, upon which there was no administration. Under Articles 887 and 924 of the Louisiana Civil Code relating to intestate succession and applicable in 1942, the children of a deceased father rank first in the order of

devolution, while the surviving wife ranks farther down the list after descendants, ascendants, and collateral heirs of the blood. The plaintiff and her late husband had two children. They were minors when they arrived in the United States from Germany with their parents, but were of age when their father died in 1942. They are both attorneys at law and represented their mother, the plaintiff, in the trial of this case as her attorneys. They, and not the plaintiff, inherited the instant claim from their late father as a chose in action, and they would be the sole persons entitled to claim. If they were to renounce under Louisiana law the property right would then succeed to Dr. von Kalinowski's collateral kindred and not to the plaintiff. The plaintiff is thus not the proper party in interest, and the special act under which this suit was filed does not authorize the court to permit an amendment substituting the two sons as the proper parties plaintiff.

There remains the question of damages. The task of determining the fair market value of the property in suit is complicated by the fact that the property is not available for physical appraisal. Findings 24 through 28 contain in detail the factors available for consideration in arriving at value. The plaintiff claimed a value of $66,000. It has been reasonably concluded and so found that the fair market value of the articles in suit was $8,125.72 as of October 1931 when they were sold at auction to satisfy unpaid customs duties.

Each House of Congress should be informed that the defendant is not liable to the plaintiff, either legally or equitably, solely because she was not technically the owner of the property in suit. Nor do the circumstances justify the payment of any amount to her, or

to any other person not the legal owner, as a gratuity. But each House of Congress should be further advised that Julian O. and Gordon E. von Kalinowski, the two sons of the plaintiff and her late husband, would have been legally entitled to the entry of judgment in their favor in the amount of $8,127.72, without interest, had they been the persons authorized by the special act to file this proceeding.

Findings of Fact.

1. The instant suit was filed pursuant to the following Private Law 85-304, 85th Congress, approved March 15, 1958, conferring jurisdiction on the court:

AN ACT

Conferring jurisdiction upon the United States Court of Claims to hear, determine, and render judgment upon a certain claim of Mrs. Walter E. von Kalinowski.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any statute of limitations or lapse of time or any limitation upon the jurisdiction of the United States Court of Claims to hear, determine, and render judgment on claims against the United States, jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Mrs. Walter E. von Kalinowski. Suit upon such claim may be instituted by Mrs. Walter E. von Kalinowski at any time within three years after the date of enactment of this Act.

Sec. 2. The provisions of sections 1492 and 2509 of title 28, United States Code, shall be applicable to this Act.

Approved March 15, 1958.

2. The plaintiff is a citizen of the United States and is the widow of the late Dr. Walter E. von Kalinowski, who died October 12, 1942, in New Orleans, Lousiana. Dr. von Kalinowski was a naturalized American citizen since 1920, was a professor at various colleges in Missouri, Louisiana, and elsewhere, and resided permanently in New Orleans during the last four years of his life.

3. Dr. von Kalinowski's German mother, Baronin von Kalinowski, had been a wealthy woman prior to the drastic inflation in post-World War I Germany. Her husband was a member of the German aristocracy.

4. Baronin von Kalinowski died testate at Wiesbaden, Germany, on April 8, 1928. She left various items of jewelry, silver and laces to her son, Dr. von Kalinowski. One of these items was a gold bracelet with diamonds in the shape of a star, which the plaintiff contends had been given to her by the Baronin prior to her death, and the defendant claims was bequeathed to Dr von Kalinowski. While the Baronin had indicated an intention to will the bracelet to the plaintiff according to a letter in evidence written by her in 1919, the will itself was not in evidence. The bracelet appeared in the inventory of the Baronin's estate. It must, therefore, be concluded that the bracelet was not given by the Baronin to the plaintiff but was bequeathed by her will to the late Dr. von Kalinowski along with other valuables.

5. In June 1928 Dr. von Kalinowski, accompanied by the plaintiff and their two minor sons, journeyed from the United States to Wiesbaden, Germany. The plaintiff contends, and the defendant denies, that Dr. von Kalinowski made a gift *inter vivos* to the plaintiff of the valuables he had inherited from the Baronin. On or about October 8, 1928, on the occasion of the distribution of the jewelry in question to Dr. von Kalinowski by the executor, Dr. von Kalinowski directed the executor to "Give them to her [meaning the plaintiff]. They are hers now." In further support of the donative intent, Dr. von Kalinowski applied for and was issued on October 31, 1928, a travel insurance policy, naming the plaintiff as beneficiary, covering the transportation of the von Kalinowski baggage and jewelry on the pending return voyage to the United States. The policy provided total insurance coverage of 42,000 marks, of which 40,000 applied to "diamonds and jewelry." Still other circumstances tend to refute the gift of the jewelry to the plaintiff, as will be seen. The question of ownership of the items in suit was never raised prior to the instant suit, so far as is disclosed in the record.

6. In mid-October 1928 the plaintiff and her husband conferred with the American consuls in Frankfort and Berlin, and with the Special customs Agent in Berlin, for the purpose of ascertaining whether the jewelry was dutiable under the customs laws of the United States. They purportedly were informed orally that the jewelry would not be dutiable because it had been inherited and not purchased, and that it could be admitted duty-free to the United States as personal ef-

fects. Following these conferences a consular invoice was applied for on October 10, 1928, by Dr. von Kalinowski, and was issued by the American consul in Frankfurt on December 21, 1928. The declaration accompanying the invoice was prepared on a "merchandise not purchased" form, and was signed by Dr. von Kalinowski as "owner" of the property to which it pertained described as "articles of jewelry, gold, silver and laces." The invoice stated that "These articles are inherited property of Professor Walter von Kalinowski from his mother who died in Wiesbaden, 8 April 1928 and who was Baronin Henrietta von Kalinowski, maiden name Pfaehler, Wiesbaden, Adolfsalee 31." The invoice stated the value of the articles to be 8,434 marks.

7. On November 3, 1928, Dr. von Kalinowski, accompanied by the plaintiff and their two children, embarked from Liverpool, England, arriving at New York on or about November 11, 1928. En route the jewelry and other valuables which he had inherited were left with the ship's purser for safekeeping, except for a ring which the plaintiff wore. It is not possible to determine from the record precisely what items were left by the Baronin's estate to Dr. von Kalinowski and brought by him to the United States, but at least several items of jewelry so inherited and imported do not appear in the list in the succeeding finding 8. Also en route Dr. von Kalinowski made out a baggage declaration which declared a foreign value of 4,000 German marks for the jewelry and which, in accordance with custom, was collected before the ship docked and held for the use of the pier customs inspector assigned to inspect the declared baggage. The customs offi-

cials were fully aware, or should have been, that the property had been acquired by Dr. von Kalinowski by inheritance. The von Kalinowskis intended to retain the property for sentimental reasons as family heirlooms, and did not import them with an intention to sell them.

8. On arrival in New York the von Kalinowskis baggage was opened for customs inspection. Discussions were had by them with various customs officials, including the Assistant Collector of Customs, there being some question as to what extent, if any, the inherited jewelry and effects would be dutiable. The valuables which Dr. von Kalinowski had inherited from his mother were examined by the inspectors and appraised by an examiner in consultation with a jewelry expert. On November 15, 1928, the customs officials released to the von Kalinowskis as duty-exempt a diamond brooch with matching earrings classified as "artistic believed to be over 100 years old," which they had appraised for customs purposes at $1,000, and which same items had been appraised at 925 German marks in the Baronin's estate inventory. The von Kalinowskis were given an opportunity to demonstrate, by affidavit or otherwise, that the other inherited valuables were duty-exempt antiques, but they were without specific knowledge as to the age of the items. At the same time the von Kalinowskis were given their collective personal exemptions and allowances totaling $465 for the family of four persons (consisting of $30 allowance for wear, $35, allowance for antique lace, and their $400 personal exemptions for which were released unidentifiable pieces of jewelry totaling that much in customs valuation), and the customs officials held for payment of $640 cus-

toms duty (computed at 80 percent) the following items of "jewelry old and used" which had been appraised for customs at $800:

	Reichsmarks
a. Man's ring of entwined snakes, with diamond and emeralds	
b. Ring with five large and various small diamonds	250
c. Marquise ring with four large diamonds, three sapphires, and small diamonds	230
d. Ring with pearl, emerald and diamond	400
e. Ring with three large diamonds, three rubies and small diamonds	400
f. Cameo brooch with diamonds	380
g. Diamond brooch with white sapphire and eighty small diamonds	600
h. Gold bracelet with diamonds in shape of star	550
i. Jewel box, bronze and ivory miniature	10
j. Gold-plated silver strainer and nine gold-plated silver Mocha spoons, each with a gold coin inserted, all in a box	9
k. Coral necklace	15
l. Pair earrings with two pearls, two large and six small diamonds	900
m. Two pieces of gold chain, one medal, one gold charm, three pearls, twelve small diamonds	3

The column of figures to the right of the foregoing schedule of items reflects the value, in then prevailing German marks, appearing in the original inventory of Baronin von Kalinowski's estate as reported by the appraiser in Wiesbaden, Germany, and is given here not as proof of value but as a possible indication of the value relationship among the various items. Item *a* in the enumeration was not in the Baron's estate, but was the property of Dr. von Kalinowski, having been willed to him by his father who died in 1905. The gold chain, charm and medal listed as part of item *m* in the above enumeration were not in the Baronin's estate but were the personal effects of Dr. von Kalinowski.

9. The von Kalinowskis were unable to pay at that time the $640 duty on the held items, and they were deposited in Public Stores, which is a Government warehouse and not a bonded warehouse.

10. In March 1929 the U.S. Customs officials, pursuant to plaintiff's request of the preceding month, authorized the plaintiff to manipulate the jewelry, *i.e.*, remove the gems from their mounts and reenter the stones separate from the mounts, which would have resulted in a substantial reduction of duty. The von Kalinowskis did not avail themselves of this opportunity, possibly because of the expense of dismounting and remounting, and the possibility of loss of the stones in the process.

11. On September 20, 1929, the plaintiff wrote to to the Commissioner of Customs that stringent financial circumstances prevented her from redeeming the jewelry detained since November 12, 1928, and that the period for its redemption would soon expire. She referred to the jewelry as family heirlooms of unknown antiquity inherited by her husband, made no explicit claim to the property as hers, and sought the Commissioner's intervention to secure an equitable adjustment of the problem. By letter the following month to Dr. von Kalinowski the Customs Service gave him a six-months' extension until April 1930 to redeem the jewelry by payment of the duty and informed him that the jewelry was being held in the U.S. Appraiser's Warehouse.

12. In February 1930 the jewelry was transferred to the U.S. Customs Seizure Room in Brooklyn, New York in preparation for the ensuing spring auction of unclaimed parcels. At that time an Unclaimed Merchandise Tag was prepared, the front of which bore in part the following data:

	1 pkg. 1 assortment jewelry old and used	
80%	180000	225000

In the ordinary course of procedure followed in such situations, absent error, this would be an abbreviated form of stating that imported merchandise valued at $1,800 for customs purposes was to be sold for nonpayment of customs duty computed at 80 percent, and that the "domestic value" of the merchandise (which term was a meaningless fiction and was inserted simply because the regulations required it) was $2,250. On the reverse aside of the tag a sales employee of the customs service had written the following:

Jewelry old and used	80000
Jewelry artistic 0 100	$100000
	$180000

Except for the total, this information on the reverse side of the tag was taken from the original baggage declaration and meant that old and used jewelry appraised at $800 was subject to 80 percent duty, and that artistic jewelry over 100 years old appraised at $1,000 was exempt from duty. Through an apparent error the total of the two, $1,800, was transferred to the front of the form as seen above by an unknown clerk, thus making it appear as stated above that jewelry appraised at $1,-

800 was to be sold for nonpayment of 80 percent duty, whereas actually jewelry appraised at $800 was to be sold for non-payment of the 80 percent duty amounting to $640. Normally the fictional "domestic value" was computed by adding 10 percent to the sum of the appraised value and the duty, a somewhat arbitrary procedure which, however, did no harm because the "domestic value" figure meant nothing either to the customs officials or knowledgeable bidders, even though it was the only value which appeared in the catalog announcing the sale. The fact that $1,800 happens to be 80 percent of $2,250 is merely a coincidence and does not aid in determining the cause for the error which was made.

The plaintiff contends that the foregoing sequence of events established the fact that the property in suit was reappraised in February 1930, and that the reappraisal was made without the owner's knowledge, contrary to the requirement of regulations requiring notice, etc. There is in evidence as an admission against the defendant's interest a letter from the Acting Secretary of the Treasury stating that the property was reappraised at $2,250. On balance, taking into consideration the record as a whole, it is reasonably concluded that the information appearing on the Unclaimed Merchandise Tag was the product of error and that there had been no reappraisal of the property in suit.

13. On September 30, 1930, Dr. von Kalinowski wrote to the Assistant Collector of Customs expressing his intention to redeem the jewelry as soon as he could and stating further:

> While I was in Washington, I took occasion to look up the Commissioner of Customs, Mr.

Eble. Mr. Eble was out of the city, but I had to talk with Mr. Ashworth. I thought I might be able to obtain a little more information about my own case. Mr. Ashworth told me that three years is the limit, before the Government sells what they called unclaimed parcels. In that case, I have still another year's grace, as I did not bring these jewels into the country until November 12, 1928. Will you kindly advise me at once in regard to this matter?

I will appreciate any extra time allowance you may grant me.

The reply of the Assistant Collector to the foregoing letter is not in the record, but it granted a further extension to April 1931 without commenting on Dr. von Kalinowski's inquiry as to whether he had another year's grace. Neither of the von Kalinowskis after receiving this incomplete response from the Assistant Collector made further inquiries as to the three year redemption period.

14. On March 19, 1931, the plaintiff wrote to the Assistant Collector requesting another six months' extension of time to redeem the parcel of jewelry on the grounds of inability to raise the required funds, and stating "I am aware that I have about exhausted your patience with persistent semi-annual requests and my time limit to redeem the parcel of jewelry as well." In his reply of April 8, 1931, the Assistant Collector stated to the plaintiff in part as follows:

This merchandise was long since transferred to the Seizure Room for sale as unclaimed. However, it has been withheld from such sale upon your

request. This office will give y
tension of six months from date
which to claim this jewelry. How
the lapse of time since the articl
into the United States, it will be
tend this time any further.

15. On October 16, 1931, the plaintiff conferred with a Mr. Nagel, who was her friend and a former cabinet member under President Taft, and enlisted his aid in obtaining either another time extension or other dispensation. In her letter to Mr. Nagel of that date she advised him that "The time limit of three years will expire on Nov. 12, coming * * *." It is concluded that the plaintiff was honestly confused as to whether she had three years from November 12, 1928, within which to redeem the jewelry, although she was aware that October 8, 1931, was the expiration date of the final six months' extension which had been granted her by the Assistant Collector in the preceding April. The plaintiff knew also that sales of unclaimed parcels were held in April and October of each year.

16. On October 8, 15 and 22, 1931, the following notice appeared in both the New York Herald Tribune and the Journal of Commerce:

> Notice is hereby given that public auction of unclaimed goods will be held in the U.S. Customs Seizure Room, Army Base, 58th St. and 1st Ave., Brooklyn, on October 20, 1931, at 10 a.m. The goods may be seen from 9 to 3 on October 26 and 27. Catalogs will be mailed from the Seizure Room on October 22.
>
> Philip Elting, *Collector.*

In 1931 the circulation of the New York Herald Tribune was 292,104 and that of the Journal of Commerce was 25,283. The population of New York City at that time was 6,930,446. No personal notice of the proposed sale was given to the von Kalinowskis, although the Custom officials were aware of their address.

17. Under the columnar heading "value" in the catalog announcing the sale appeared the amount $2,250, the significance of which is discussed in finding 12, *supra*. The catalog listed, *inter alia*, in abbreviated form the items enumerated in finding 8, *supra*, except for item *l* in that enumeration, viz., pair earrings with two pearls, two large and six small diamonds. Prior to the sale this omission was discovered and was corrected by attaching to the page of the catalog used by the auctioneer at the sale a separate sheet itemizing the von Kalinowski jewelry including the earrings in question.

18 The auction sale was held as advertised on October 29, 1931, and the von Kalinowski jewelry was bid in by various purchasers for the following prices totaling $880:

a. Man's ring of entwined snakes, with diamond and emeralds	$6.00
b. Ring with five large and various small diamonds	40.00
c. Marquise ring with four large diamonds, three sapphires, and small diamonds	70.00
d. Ring with pearl, emerald and diamond	15.00
e. Ring with three large diamonds, three rubies and small diamonds	20.00
f. Cameo brooch with diamonds	20.00
g. Diamond brooch with white sapphire and eighty small diamonds	165.00
h Gold bracelet with diamonds in shape of star	300.00
i. Jewel box, bronze with ivory miniature	5.00
j. Gold-plated silver strainer and nine gold-plated silver Mocha spoons, each with a gold coin inserted, all in a box	42.00
k Coral necklace	15.00
l. Pair earrings with two pearls, two large and six small diamonds	160.00
m Two pieces of gold chain, one medal, one gold charm, three pearls, twelve small diamonds	22.00

The purchasers paid for and received delivery of their purchases on November 2, 1931. A net balance of $107.11 remained from the proceeds of sale after debiting the $640 in duty and $72.89 in expenses for storage, advertising and sale. According to defendant in its requested findings, this $107.11 balance is still due the estate of the late Dr. von Kalinowski and has never been demanded.

19. The plaintiff's first actual knowledge of the October 29, 1931 sale came to her by means of a letter dated November 5, 1931, from her friend and representative, Mr. Nagel, who on November 2 (four days following the sale) had visited the Customs officials in New York on plaintiff's behalf. In this letter Mr. Nagel informed the plaintiff that he had requested the officials to ascertain whether some of the pieces sold could be retrieved from the purchasers. Subsequent efforts made by the Custom officials in this direction were unsuccessful.

20. In his letter to the Customs officials of December 4, 1931, Mr. Nagel stated in part as follows:

> The parties in interest had in mind the three year term, and thought they were within time when I called at your office. You were governed by the period of the last extension, copy of which I do not have before me. However that may be, I am rather surprised that notice of the proposed sale was not sent to the parties. They had manifested very keen interest in these articles, for reasons which are quite obvious. Although it may not have been necessary to advise them, it seems to me that such notice to them would have been only fair, and was certainly advisable, inasmuch as the

purpose must be to get the best possible prices at a sale.

* * * * * * * *

Finally, I doubt whether any of these articles were really subject to sale. I am given to understand that the authorities are not quite clear upon that subject, and under these circumstances it would have been particularly desirable to have the parties notified, in order that they might protect themselves and might have given the authorities the advantage of acting with the consent of the parties in interest.

I state my impressions because it does appear to me that the result is most unfortunate, and gives the parties in interest a perfectly natural cause for complaint.

What their course will be I do not know, because I undertook to represent them merely by way of friendly assistance, prepared to pay the whole duty when I came to your office, if that were necessary. I do not expect to represent them professionally, but shall ask them to consult their own counsel about the matter.

21. In succeeding years considerable correspondence passed between the plaintiff or others in her behalf and the Treasury Department in a continuing effort by the plaintiff to secure redress. The following selected excerpts from some of these letters disclose the warring contentions of the parties:

a. Letter of January 21, 1932, from Customs Service to Honorable Charles Nagel, replying to latter's inquiry of December 4, 1931:

For your further information I quote as follows from Section 491 of the Tariff Act of 1930:

"Any merchandise of which possession has been taken by the collector which shall remain in bonded warehouse or public store for one year from the date of importation without entry thereof having been made and the duties and charges thereon paid * * * shall be appraised by the Appraiser of merchandise and sold by the Collector at public auction."

You will note that the articles in question were legally disposed of under customs laws and frankly I cannot see how the parties in interest have any case for complaint as they were put on notice that the time limit of extension was definitely fixed as of six months from April 8, 1931.

b. Letter dated May 15, 1933, from Acting Commissioner of Customs to Honorable John J. Cochran, Member of Congress from Missouri, who had written on behalf of Dr. von Kalinowski:

As you no doubt know the duty on merchandise entered for warehouse is not required to be paid at the time of entry but is collected at the time of the withdrawal of the merchandise from the warehouse, the warehouse period being three years, that is, the merchandise may be withdrawn at any time within three years from the date of importation for consumption upon payment of the duty and charges, or for exportation without payment of duty, etc.

Since an application had been made for the manipulation of the jewelry which, as heretofore indicated, would have required a warehouse entry

and since the application for manipulation had been granted by the Bureau prior to Mr. Kalinowski's visit to the Bureau, the warehouse period of three years from the date of importation was possibly mentioned at that time.

* * * * * * * *

You are advised that all merchandise brought into the United States is dutiable unless exempted from duty under some provision of law. The Appraiser found the jewelry in question not to have been entitled to entry free of duty.

There is no provision of law or regulation which entitled an importer to personal notification of the sale of any merchandise brought in by him which merchandise has become unclaimed and abandoned to the Government because the importer fails to comply with the requirements of the law and regulations to secure release of the merchandise from customs. At the time of sale of the jewelry a brief notice of the time and place of such sale for three successive weeks immediately preceding the sale in two newspapers of extensive circulation published at the port was required.

* * * * * * * *

The articles brought in by Mr. Kalinwoski were sold under authority of Section 491 of the Tariff Act of 1922, the pertinent portion of which provides that if any merchandise of which possession has been taken by the Collector shall remain in bonded warehouse or public store for one year without entry thereof having been made and the duties and charges thereon paid, such merchandise

shall be sold by the Collector at public auction as abandoned to the Government under such regulations as the Secretary of the Treasury shall prescribe.

* * * * * * * *

The foregoing review of the case shows that Mr. Kalinowski was accorded every possible consideration and that the jewelry was finally disposed of by the Government as directed in Section 491 of the Tariff Act of 1922.

The Bureau regrets that it is unable to now aid Mr. Kalinowski.

c. Letter dated July 18, 1933, from Acting Commissioner of Customs to Honorable John J. Cochran:

With respect to Mr. Kalinowski's inquiry of how could it have been considered that he had abandoned the articles to the Government when he was in direct correspondence with the Customs office in New York during the entire period, and had expressed his intention of exporting the articles back to Germany rather than forfeit them to the Government, you are advised that because of Mr. Kalinowski's failure to perform all the conditions required to secure the release of the merchandise, under Section 491 of the Tariff Act, the Collector was authorized and directed to sell the merchandise at public auction as abandoned to the Government. After the expiration of the one-year period, exportation of the articles in question was prohibited by Article 920 of the Customs Regulations of 1923, except on payment of the duty and all charges and expenses. Entry for warehouse

under any condition was also prohibited by Article 926.

The one-year period referred to in Section 491 of the Tariff Act, and the three-year period mentioned in Section 557 of the Tariff Act, have no connection. Section 491 is applicable to merchandise which has not been released from Customs because the importer fails to take the necessary action to secure such release. Section 557 provides for a proper entry at the customhouse for a specific purpose, namely, storage in a Customs bonded warehouse for a period not to exceed three years, with all of the privileges given by Section 557 attaching.

* * * * * * * *

Mr. Kalinowski again states " " the articles were sold without notice to him . he never received official notice from the ollector of Customs at New York of the intention to sell, or that the articles were sold. As stated in the Bureau's letter of May 15, 1933, there is no provision of law or regulation which entitles an importer to personal notification of the sale of merchandise which has become subject to sale because of his failure to comply with the governing law and regulations. * * *

* * * * * * * *

With reference to your constituent's observation concerning the tariff classification of various of the articles sold it would appear that some of them might have been conditionally free of duty had proper claim been made on entry and appropriate

proof furnished to show that the conditions for exemption from duty were satisfied. This is possibly true of the items referred to as 9 spoons, 1 strainer, and 1 medal. As no proper claim was filed, the conditionally exempt status of the articles, if it existed, does not affect the propriety of their sale.

Mr. Kalinowski's objections to the dutiable status of jewelry with personal associations and inheritances raise a question of Congressional policy. All articles imported into the United States have a value for customs purposes and are subject to duty unless specifically exempted therefrom, and no free entry is provided for heirlooms as such, nor for jewelry imported under the circumstances of this case.

Your constituent's opinion that a bracelet was denied free entry as an artistic antiquity because of its value is in error. The age, the artistic merit, and compliance with the customs regulations are the sole requirements for the free entry of antique jewelry, and value has no bearing upon the matter.

d. Letter dated October 7, 1933, from Commissioner of Customs to Honorable John J. Cochran:

Mrs. Kalinowski asks that the statement of the Bureau in its letter addressed to you on July 18, 1933, that "no free entry is provided for heirlooms as such" be explained. Neither the word "Heirlooms" nor its equivalent is used in the tariff laws, and it is accordingly impossible, under the law, to give consideration, in classifying articles for tariff purposes, to the fact that they may be heirlooms.

To further inform Mrs. Kalinowski, merchandise entered for warehouse is not held in the Appraiser's warehouse or public store, but must be stored in a warehouse, designated by the importer, bonded for the storage of imported merchandise generally. The Appraiser's warehouse or public store consists of premises owned or leased by the Government for the storage of merchandise undergoing examination by the Appraiser, under seizure, or pending final release from Customs custody, or merchandise awaiting sale as unclaimed.

22. Since the rejection of plaintiff's efforts to secure redress from the Customs Service as indicated in the preceding correspondence, the plaintiff continued in sporadic efforts to perfect her claim, culminating in her application for Congressional relief which resulted in the enactment of Private Law 85-364, 85th Congress, quoted in finding 1, *supra*.

23. Dr. von Kalinowski, plaintiff's husband, died intestate on October 12, 1942, at New Orleans, Louisiana, his last place of residence. There was no administration of his estate. He was survived by the plaintiff and her two sons, both of whom are attorneys at law and represented the plaintiff in the trial of this case.

Valuation

24. Judicial notice is taken that the official exchange rate of the German reichsmark in United States currency averaged 23.9154 cents in April 1928, 23.8143

cents in November 1928, and 23.8234 cents in October 1931. These rates appear in Table 173 on page 671 of an official publication of the United States Board of Governors of The Federal Reserve System entitled Banking and Monetary Statistics published in 1943. The monthly averages are based on daily currency quotations on the New York market as gathered by The Federal Reserve Bank of New York and reported to the Secretary of the Treasury, who published them weekly as Treasury Decisions (see T.D. 42692, 42704, 42724, 42730, 43028, 43033, 43049, 43056, 45173, 45182, 45195, 45213, 45230.)[1]

25. In presenting valuation evidence as to the jewelry in suit, which was not available for physical appraisal for reasons heretofore explained, the plaintiff relied primarily on the testimony of two witnesses. The first witness was a jewelry designer who drew sketches of each individual piece of the missing jewelry. The sketches were based upon the recollection of the plaintiff and the descriptions of the jewelry as contained in such documents as the inventory of the Baronin von Kalinowski's estate, early correspondence, the auction sale catalog, and certain other incomplete recordations by the Customs Service. Although the Customs Service was aware that the plaintiff was anxious to redeem the jewelry and had granted several extensions for this to be done, it never recorded a detailed de-

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[1]At all times pertinent to this case there was applicable the provisions of 40 Stat. 739, § 522 (31 U.S.C. 372) under which the Secretary of the Treasury was directed to issue proclamations fixing the conversion rates of foreign currencies for the purpose of the assessment and collection of duties on imported merchandise. The effect of the rates so fixed is discussed in Staedtler v. United States, 25 C.C.P.A. (Customs) 136 (T.D. 49255) which cites in support Hadden v. Merritt, 115 U.S. 25.

scription of the jewelry in anticipation of a possible post-auction claim, as prudence might have dictated. The plaintiff's second witness was an expert gemologist and jewelry appraiser who appraised the jewelry on the basis of the sketches, the plaintiff's description, and other descriptions in the record, giving values for both 1931 and April 30, 1959. The appraiser assumed the gems to be genuine (conceded by the defendant), that the diamonds were average fair quality commercial white diamonds and not gem, or flawless, diamonds (the latter being 50 percent to 75 percent more valuable), and that the settings indicated an age of from 60 to 100 years so that his replacement cost estimates contemplated old-cut rather than new-cut stones, the latter being of greater value.

26. The composite table below shows as to each piece of jewelry, and as to the total, the appraised value as given in the inventory of Baronin von Kalinowski's estate, its value declared by Dr. von Kalinowski on his arrival in New York in 1928, the amount for which it was sold at the Customs auction on October 29, 1931, and the retail replacement cost (synonymous with fair market value) estimated by plaintiff's appraiser at trial both as of 1931 and April 30, 1959. Retail replacement costs of jewelry in 1931 were about one-half of those in 1959. The retail replacement costs for 1959 in the table below as provided by plaintiff's expert appraiser include a 10 percent Federal excise tax currently applicable to sales of jewelry, while those for 1931 do not since there was no such tax at that time. All replacement costs shown include a jeweler's markup over his cost of 50 to 60 percent, which is in keeping with the trade custom.

Item	Baronin's estate valuation as of April 1928		Declared value,	Auction sale,	Value per plaintiff's expert appraiser	
	Marks	Dollars	1928	1931	1931	Apr. 30, 1959
a. Man's ring of entwined snakes, with diamonds and emeralds[1]				$6.00		
b. Ring with five large and various small diamonds	250	59.79		40.00	$4,545.46	$10,000.00
c. Marquise ring with four large diamonds, three sapphires, and small diamonds	230	55.01		70.00	8,181.82	18,000.00
d. Ring with pearl, emerald and diamond	400	95.66		15.00	681.83	1,500.00
e. Ring with three large diamonds, three rubies and small diamonds	400	95.66		20.00	2,954.55	6,500.00
f. Cameo brooch with diamonds	380	90.88		20.00	500.00	1,100.00
g. Diamond brooch with white sapphire and eighty small diamonds	600	143.94		165.00	5,000.00	11,000.00
h. Gold bracelet with diamonds in shape of star	550	131.53		300.00	6,818.19	15,000.00
i. Jewel box, bronze and ivory miniature	10	2.39		5.00		
j. Gold-plated silver strainer and nine gold-plated silver Mocha spoons, each with a gold coin inserted, all in a box	9	2.15		42.00		
k. Coral necklace	15	3.59		15.00		
l. Pair earrings with two pearls, two large and six small diamonds	900	215.24		160.00	1,590.91	3,500.00
m. Two pieces of gold chain, one medal, one gold charm, three pearls, twelve small diamonds	3	.72		22.00		
Totals	3,747	896.11	[2] 952.94	880.00	[3] 30,272.75	[3] 66,600.00

[1]This ring was not part of the Baronin's estate inventory.

[2]Converted from 4,000 marks @ $0.238234 per mark.

[3]No appraisals for items *a*, *i*, *j*, *k* and *m*. Note also that the 1931 appraisal is without Federal excise tax, since there was none at that time, while the 1959 appraisal includes 10 percent Federal excise tax.

27. In finding a fair market value as of October 1931 for the plaintiff's jewelry, etc., sold at auction in that month, several factors have been considered along with the data in the above table, viz:

a. It will be noted that items *b*, *c*, *d*, *e*, *f*, *g*, *h*, and *l*, which plaintiff's expert valued at $30,272.75 as of October 1931, realized a gross of $790 at the Customs auction, or only 2.61 percent of the appraisal by plaintiff's expert. Appraisals by Customs for purposes of duty are extremely low, somewhat analogous to appraisals for inheritance or estate tax purposes where the taxpayer is given the benefit of a valuation substantially less than market value. Sales at auction are in the nature of distress sales and thus the prices brought are normally substantially less than market value. Judicial knowledge cannot be taken of the percentage less than market value either of property sold at auction or of the Customs appraisals, and the record does not provide such a figure. The valuations provided by plaintiff's expert are deemed to be unrealistically high, due not to the expert's lack of capacity or candor, but to his lack of opportunity to examine the jewelry.

b. There were released to the von Kalinowskis in November 1928 as antiques a brooch and earrings appraised by Customs at $1.000, but which had been appraised at 925 marks ($220.29 at the contemporaneous official exchange rate) in the German inventory of the Baronin's estate, which, assuming the inventory appraisal to have been correct, would have represented an exchange ration of $1.08 per mark for the purpose of that transaction. On the other hand the Customs officials had appraised at $800 those items held for

sale which had been valued at 3,710 marks in the German inventory of the Baronin's estate, which, again assuming the inventory appraisal to have been correct, would have represented an exchange ration of $0.215 per mark. There is thus a basic and unexplained inconsistency in the disparate valuations given by Customs to that property which was sold at auction and that which was released to the von Kalinowskis as duty-free antiques. It is probably true that the valuations given in the German inventory of the Baronin's estate were substantially low because quite commonly valuations given for estate tax purposes are leniently low, but it could be fairly assumed that the separate valuations in the inventory bore a reasonably correct relationship to each other and were no further away from reality than the Customs appraisal prices on the one hand and the values fixed by the plaintiff's expert witness on the other. It is obvious that the amounts received at auction were substantially below fair market value, but it is not worthy of credulity that the fair market value was 38 times that of the Customs appraisal, as plaintiff's expertise would indicate. This is particularly true when consideration is given to the fact that, prior to leaving Germany to return to the United States in 1928 the plaintiff's husband insured the same items for $9,525.72, the domestic equivalent of 40,000 German marks. It may be reasonably assumed that in procuring baggage insurance for the trip Dr. von Kalinowski fixed an insurance valuation at least equal to, and probably in excess of the fair market value of the items at that time. Since there were released to the von Kalinowskis by Customs agents upon their arrival in New York jewelry

and laces in the total value of $1,400 as appraised by Customs, deducting this sum from $9,525.72 would leave $8,125.72 as the maximum value of the items which were sold by Customs for $880, according to the plaintiff's admission as represented by the baggage insurance policy.

28. It is thus found that the fair market value of the items of personal property in suit which were sold at the auction sale in October 1931 for nonpayment of duty was, as of that time, $8,125.72. This figure includes the $107.11 stated in finding 18, *supra,* to be the net balance from the auction sale proceeds credited to Dr. von Kalinowski and never paid to or demanded by him or his heirs since.

Recommendation for Conclusion of Law

It is recommended that the court adopt the following conclusion of law:

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover and the petition is dismissed.

Respectfully submitted.

C. MURRAY BERNHARDT, *Commissioner.*

APPENDIX C.

Opinion, Findings and Judgment of Court of Claims.

In the United States Court of Claims.

No. 234-58. (Decided November 2, 1960.)

Mrs. Walter E. von Kalinowski v. The United States.

Max O. Truitt, Jr. and *Gordon E. von Kalinowski* for plaintiff. *Julian O. von Kalinowski* on the briefs.

Philip W. Lowry, with whom was *Assistant Attorney General George Cochran Doub*, for defendant.

Opinion.

Laramore, *Judge*, delivered the opinion of the court:*

The plaintiff is before the court by virtue of a special jurisdictional act authorizing the court to hear, determine, and render judgment on her claim for the value of certain jewelry and other effects which were brought by her into the United States from Germany in 1928 and were sold at a customs auction in 1931 for nonpayment of duty. At the outset it is observed that section 2 of the jurisdictional act contains the novel direction that sections 1492 and 2509 of title 28, United States Code, "shall be applicable to this Act." Section 1492 of title 28 empowers the court "to report to either House of Congress on any bill referred to the court by such House," and section 2509 directs that such report to either House shall contain, in addition to the facts of the claim, "conclusions sufficient to in-

*Commissioner C. Murray Bernhardt at the direction of the court, prepared an opinion and a recommended conclusion of law in this case. Commissioner Bernhardt's opinion is substantially adopted by the court, except as to the issue of ownership and the recommended conclusion of law.

form Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant." The plaintiff urges that the unorthodox language of the act means that the court is to render judgment on the merits of the claim on either a legal or equitable basis, but the act does not say this. A more logical construction would be that the court is to enter judgment for the plaintiff if the defendant is found to be legally liable, but if there is no legal liability then the court is to report to *each* House of Congress (since the bill initiating the act passed both Houses) any amounts legally or equitably due the plaintiff, including the award of a gratuity if the facts persuade that sort of recommendation. In the past, Congress has had no difficulty in finding explicit language directing the court to exercise equitable jurisdiction if that was desired. See the special acts in Murphy v. United States, 35 C. Cls. 494, United States v. Weil, *et al.*, 35 C. Cls. 42 Lamborn and Co. v. United States, 106 C. Cls. 703, and Burkhardt, *et al.*, v. United States, 113 C. Cls. 115. The court cannot safely assume powers in excess of its standard jurisdiction in the absence of a clear and unambiguous mandate.

The plaintiff rests her case in general on the dual propositions that the property which was sold to satisfy customs duty was of a character properly exempt from duty, and that the sale was void because of material procedural defects. The defendant denies these contentions and maintains in addition that the plaintiff was not the owner of the property.

Turning to the plaintiff's first premise, that the property was exempt from duty, this in turn rests on the

theories that it was inherited, that it consisted of articles of personal adornment and household effects made exempt by statute, and that the defendant is estopped from claiming that the property was dutiable because the plaintiff had relied to her detriment on erroneous advice given her by American consular officials in Germany prior to importation of the property. Even if the defendant's consular officials in Germany had so advised the plaintiff prior to her departure from Germany, and this is indicated only by plaintiff's unverifiable asseverations of oral conversations she had in 1928 with the said officials, the defendant would not be estopped from repudiating the advice if it was in error. Utah Power & Light Co. v. United States, 243 U.S. 389, 409; United States v. San Francisco, 310 U.S. 16, 31; Commissioner of Internal Revenue v. Duckwitz, 68 F. 2d 629; Fleming v. Miller, 47 Fed. Supp. 1004.

Inherited property is not, as plaintiff contends, exempt *per se* from duty under the law. The relevant "free list" of imports appears in Title II of the 1922 Tariff Act (42 Stat. 922-934) and does not even by indirection infer that inherited property or heirlooms are free of duty. It may be true that duties are primarily aimed at articles imported for sale (Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 686), that merchandise subject to duty is intended to embrace only merchandise in a commercial sense (United States v. Mattio, 17 F. 2d 879), and that doubts or ambiguities as to a tax should be resolved in favor of the importer (Erskine v. United States, 84 F. 2d 690, 691; United States v. Wigmore, 48 F. Supp. 250, 252), but rewriting the free list as plaintiff impliedly wants is the prerogative of Congress, not the court.

Paragraph 1695 of the 1922 Tariff Act (42 Stat. 932) exempted from duty "wearing apparel, articles of personal adornment, toilet articles and similar personal effects of persons arriving in the United States," and, in proviso at the bottom of the paragraph, added "That up to but not exceeding $100 in value of articles acquired abroad by such residents of the United States for personal or household use or as souvenirs or curios, but not bought on commission or intended for sale, shall be admitted free of duty." It is clear (if not plainly expressed) that the blanket exemption provided by the paragraph in question applies only to non-residents temporarily sojourning in this country, and that returning United States residents are exempt only up to $100 in value of the imported articles they acquired abroad. United States v. Dessin, 13 Ct. Cust. App. 28; United States v. Mattio, 17 F. 2d 879, 880. The ancestrally related provisions of the 1909 and 1913 Tariff Acts have also been so interpreted by the Court of Customs Appeals in Bradley Martin, Jr., v. United States, 1 Ct. Cust. App. 134, T.D. 31185; Bache v. United States, 4 Ct. Cust. App. 414, T.D. 33852, and Thompson v. United States, 5 Ct. Cust. App. 343, T.D. 34534. Astor v. Merritt, 111 U.S. 202, relied upon by plaintiff to show the contrary, interpreted section 2505 of the Revised Statutes of 1878, the "free list" of that day, which was substantially different from related provisions of the 1909, 1913 and 1922 Tariff Acts and so the authority is inapposite. The editor's arrangement of subparagraphs 1798 (b) and (c) of title 19, United States Code, itself clearly demonstrates the scope of the exemption provided by the 1922 and succeeding Tariff Acts. The plaintiff would further read into the

words "acquired abroad" as they are used in the proviso to the 1922 tariff paragraph cited above the restrictive meaning "purchased abroad," but the term as used seems to cover acquisitions in general whether by purchase, gift, inheritance or otherwise. The method of acquisition is merely a circumstance which does not control the question of duty so far as the statute discloses. The statute says what it means, and no need exists for interpretation of the legislative intent where there is no ambiguity.

Among the items imported by the plaintiff's late husband were an ornamental bronze jewel box, a gold-plated silver strainer, and nine gold-plated silver Mocha spoons, each of the latter containing an embedded small gold coin. Paragraph 1531, section 201, of the 1922 Tariff Act (42 Stat. 925) exempted from duty "* * * usual and reasonable furniture, and similar household effects of persons or families from foreign countries if actually used abroad by them not less than one year, and not intended for any other person or persons, nor for sale." Under an earlier version of this same provision which omitted the word "similar" (§2505 Revised Statutes, 2d. ed. 1878, p. 489) the Supreme Court ruled in Arthur v. Morgan, 112 U.S. 495, that a carriage in use abroad by its owner, an American citizen, for more than one year, was entitled to exemption from duty as being included in "household effects." Although the earlier statute was slightly more liberal than the one under discussion, it nevertheless appears that spoons, strainers and jewel boxes are readily classifiable as "usual and reasonable furniture, and similar household effects." Article 382 of the Customs Regulations extends the exemption to nationals as well as aliens, and

also recites that "Households effects used abroad not less than one year in a family of which the importer was a member may be passed free of duty, although the importer did not own the effects at the time of use." The household effects in question were in the family of Dr. von Kalinowski's mother for a considerable period while he was presumably an in-dwelling member of that family. Obviously the duty levied on the spoons, strainer and jewel box was not sanctioned by the applicable law and regulations.

The second phase of plaintiff's argument, that the sale of her property was void due to technical deficiencies, is of greater merit in part. This divides itself into the main charges that plaintiff relied to her detriment on defendant's erroneous advice that she had three years from the date of importation in which to redeem the property and so the defendant is estopped from repudiating the advice, that constitutional due process was violated when the defendant sold the property to satisfy unpaid duty without giving the owner personal notification of the time and place of sale, and that the notice by publication did not comply with the Customs Regulations of 1923. The first of these charges can be disposed of without reference to estoppel. In September 1929 the plaintiff admittedly knew that the time for her to redeem the property which had been imported the preceding November would soon expire, for at that time she requested the Commissioner of Customs to grant an extension, and an extension of six months to April 1930 was granted. In October 1930 another six months' extension was granted to April 1931, pursuant to Dr. von Kalinowski's letter requesting extra time and in which letter he

also asked the Assistant Collector for his advice regarding information given him by a customs official to the effect that unclaimed parcels are sold after being held for three years. The record contains no evidence that the Assistant Collector ever responded to this inquiry by Dr. von Kalinowski for advice as to the three-year holding period, beyond merely granting another six months' extension for redemption. The plaintiff would have the defendant estopped by its silence in not responding, but this would not apply under either the facts or the law, as will be seen. In March 1931 the plaintiff requested still another six months' extension and, in his letter to the plaintiff of April 8, 1931, granting an extension to October 8, 1931, the Assistant Collector of Customs put plaintiff on notice that "it will be impossible to extend this time any further." It would be idle in the face of this exchange to hold that the plaintiff was gulled by the defendant's failure to answer her husband's inquiry of the preceding year regarding the applicability of a three-year holding period, or to believe that the plaintiff did not know that the property would be subject to sale after October 8, 1931, if it was not redeemed beforehand. At the very least, if she was in doubt she should have sought clarification, which she did not do.

The next point is more nettlesome. The plaintiff knew that auction sales of parcels on which duty was unpaid were held in April and October of each year by the Customs Bureau. She knew that the property would be sold if she did not take steps by October 8, 1931, to redeem it. But she had no actual knowledge of the time and place scheduled for the sale. On October 8, 15 and 22, 1931, there appeared in the New

York Herald Tribune and the Journal of Commerce a notice that a public auction would be held on October 29, 1931, at which "unclaimed goods" would be sold. The notice explained that catalogs were available describing the goods to be sold, that the goods could be inspected at a certain time and place, but did not specify the items to be sold or the names of their owners. The plaintiff was at her home in Missouri and did not personally see the published notice in the New York papers. The plaintiff and the customs officials had engaged in frequent correspondence during the intervening years and the customs officials were aware of her address and of her anxiety to redeem the property.

The adequacy of the notice is in question. Section 491 of the Tariff Act of 1922 (42 Stat. 963) provides as to unclaimed goods:

> If any merchandise of which possession has been taken by the collector shall remain in bonded warehouse or public store for one year without entry thereof having been made and the duties and charges thereon paid, such merchandise shall be appraised by the appraiser of merchandise and sold by the collector at public auction as abandoned to the Government, under such regulations as the Secretary of the Treasury shall prescribe. * * *

Pursuant to this provision the Secretary of the Treasury promulgated Article 927 of the Customs Regulations of 1923, which read in part as follows:

> When the name and address of the consignee can be ascertained from the manifest of the importing vessel, or otherwise, notice of the date of sale should be mailed to him. * * *

Implementing this article, Article 1072 of the Regulations prescribed a form for notice of sale to the importer. The word "should" as used in the quoted portion of Article 927 of the regulations is a loose and deceptive term. As a breeder of confusion this slippery little word has few peers. The cases disclose its meaning can be, depending on the context of its use, mandatory or directory, imperative or precative, obligatory or discretionary, must or may, and so it goes, a veritable Yin and Yang dichotomy. See Volume 39 of Words and Phrases, permanent edition, page 31, *et seq.* The party responsible for choosing an ambiguous word should rightly suffer the consequences of its obscurity. In Fegan v. Lykes Bros. S.S. Co., 3 So. 2d 632, 198 La. 312, where a regulation of the Department of Commerce relating to precautionary operation of certain line-carrying guns and equipment provided that the impelling charge "should" be of certain specifications and provided by the shipowner, the term "should" was held to impose a mandatory requirement of compliance and to be synonymous with "ought", both of which words imply obligation. In other contexts the opposite has frequently been held, so that its meaning requires an analysis of its use in the individual case. In the instant situation if the term "should" as used in the regulation were to be construed so as to connote merely a discretionary performance little need is seen for the regulation, for without it the customs official in charge of the sale would still have authority, if he chose, to mail notices to owners whose property was scheduled for auction. It must be presumed that the regulation sought to accomplish something more than that which could occur permissively in its

absence. This view is fortified by the knowledge that Mullane v. Central Hanover Tr. Co., 339 U.S. 306, might have the effect of imposing a constitutional due process requirement of actual rather than substituted notice to the owner under the present circumstances.

It is difficult to understand why the plaintiff, forewarned that she had until October 8, 1931, to redeem the property, did not as the time approached make further inquiries which may have elicited the details of the impending sale. "It is a general rule that whatever puts a person on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding." 66 C.J.S. 642. On the other hand, it is well-established that, because the forfeiture of land to satisfy taxes is considered to be an extremely harsh measure, exact and strict compliance with the statutes must be had at the risk of the sale being void. Thatcher, *et al.*, v. Powell, *et al.*, Lessee, 6 Wheat. 111; Ronkendorff v. Taylor's Lessee, 4 Pet. 349. This philosophy has been held applicable to the forfeiture of imports not declared upon entering the United States (United States v. Mattio, *supra*). Customs duties are commonly held to be a form of tax (Brown v. State of Maryland, *supra*; Pacific Ins. Co. v. Soule, 7 Wall. 433). Logically, one can perceive no reason why the onwer of chattels sold for nonpayment of customs duty is under any different or greater criterion of duty to inqure than the owner of land sold for nonpayment of taxes. The owner of property so fixed in situs as land should be even more aware of scheduled forfeiture sales than the owner of free-moving chattels. If tax titles are so

notoriously fragile where the niceties of statutory prerequisites have not been observed, then a sale of chattels to satisfy unpaid customs duty should be equally vulnerable to procedural defects. The defendant's failure to comply with the legal prerequisites to a sale thus had the necessary effect of invalidating the sale and exposing the defendant to liability for damages flowing naturally from the breach, presupposing the sovereign's consent to be sued.

The final defense to liability is on the ground that the property in suit was owned by Dr. von Kalinowski and not the plaintiff at the time of its detention and subsequent sale, so that the plaintiff is not the proper party in interest. The plaintiff counters this by making a general claim of ownership and, in the alternative, cites authorities to the effect that one who holds merely a right to possession of chattels can maintain an action in damages for their wrongful conversion. 150 A.L.R. 238; 53 Am. Jur. 924. Taking this to be a correct statement of the preponderant view so far as it goes, manifestly a plaintiff could recover no more than the value of his possessory interest. The plaintiff here seeks the total value of the articles allegedly converted, and has given no yardstick to measure the value of a mere possessory interest or usufruct.

However, the facts here support a gift *inter vivos* of the property by Dr. von Kalinowski to the plaintiff. All that is required to meet the test of a gift *inter vivos* is that the property be such as is subject to gift; that there be competent parties donor and donee; that there be a donative intent; that there be delivery; that the gift be accepted by the donee.

As shown by finding 5, "On or about October 8, 1928, on the occasion of the distribution of the jewelry in question to Dr. von Kalinowski by the executor, Dr. von Kalinowski directed the executor of 'Give them to her (meaning the plaintiff). They are hers now.'" In addition, the articles were mostly women's jewelry, and it was natural for Dr. von Kalinowski to give them to his wife.

The fact that Dr. von Kalinowski insured the articles of jewelry naming plaintiff as beneficiary also indicates that plaintiff was the owner. Furthermore, plaintiff was in possession of the articles at the time of the taking. The record discloses that the jewelry was in a small handbag carried by plaintiff when brought into the United States. The added fact that some later business matters relating to the jewelry were conducted by Dr. von Kalinowski is not of itself indicative of ownership in him. Dr. von Kalinowski and plaintiff were husband and wife, traveling together, and it was normal and natural that the husband, as head of the family, assume responsibility over such matters. We further suppose that this was a natural consequence of their German ancestry, inasmuch as the freedom of the wife in the transaction of business affairs was not as prevalent in Germany as in the United States.

Thus we conclude from all the facts and circumstances in the case that all the necessary requisites for a valid gift have been shown, and plaintiff was the true owner of the jewelry in question.

There remains the question of damages. The task of determining the fair market value of the property in suit is complicated by the fact that the property is not avail-

able for physical appraisal. Findings 24 through 28 contain in detail the factors available for consideration in arriving at value. The plaintiff claimed a value of $60,000. It has been reasonably concluded and so found that the fair market value of the articles in suit was $8,125.72 as of October 1931 when they were sold at auction to satisfy unpaid customs duties.

Plaintiff is therefore entitled to recover the sum of $8,127.72, and judgment will be entered for plaintiff in that amount.

It is so ordered.

Durfee, *Judge;* Madden, *Judge;* and Jones *Chief Judge*, concur.

Whitaker, *Judge*, took no part in the consideration and decision of this case.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes findings of fact as follows:

1. The instant suit was filed pursuant to the following Private Law 85-304, 85th Congress, approved March 15, 1958, conferring jurisdiction on the court.

AN ACT

Conferring jurisdiction upon the United States Court of Claims to hear, determine, and render judgment upon a certain claim of Mrs. Walter E. von Kalinowski.

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, That, notwithstanding any statute of limitations or lapse of time or any limitation upon the jurisdiction of the United States Court of Claims to hear, determine, and render judgment on claims against the United States, jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Mrs. Walter E. von Kalinowski. Suit upon such claim may be instituted by Mrs. Walter E. von Kalinowski at any time within three years after the date of enactment of this Act.

Sec. 2. The provisions of sections 1492 and 2509 of title 28, United States Code, shall be applicable to this Act.

Approved March 15, 1958.

2. The plaintiff is a citizen of the United States and is the widow of the late Dr. Walter E. von Kalinowski, who died October 12, 1942, in New Orleans, Louisiana. Dr. von Kalinowski was a naturalized American citizen since 1920, was a professor at various colleges in Missouri, Louisiana, and elsewhere, and resided permanently in New Orleans during the last four years of his life.

3. Dr. von Kalinowski's German mother, Baronin von Kalinowski, had been a wealthy woman prior to the drastic inflation in post-World War I Germany. Her husband was a member of the German aristocracy.

4. Baronin von Kalinowski died testate at Wiesbaden, Germany, on April 8, 1928. She left various items of jewelry, silver and laces to her son, Dr. von Kalinowski. One of these items was a gold bracelet with

diamonds in the shape of a star, which the plaintiff contends had been given to her by the Baronin prior to her death, and the defendant claims was bequeathed to Dr. von Kalinowski. While the Baronin had indicated an intention to will the bracelet to the plaintiff according to a letter in evidence written by her in 1919, the will itself was not in evidence. The bracelet appeared in the inventory of the Baronin's estate. It must, therefore, be concluded that the bracelet was not given by the Baronin to the plaintiff but was bequeathed by her will to the late Dr. von Kalinowski along with other valuables.

5. In June 1928 Dr. von Kalinowski, accompanied by the plaintiff and their two minor sons, journeyed from the United States to Wiesbaden, Germany. The plaintiff contends, and the defendant denies, that Dr. von Kalinowski made a gift *inter vivos* to the plaintiff of the valuables he had inherited from the Baronin. On or about October 8, 1928, on the occasion of the distribution of the jewelry in question to Dr. von Kalinowski by the executor, Dr. von Kalinowski directed the executor to "Give them to her [meaning the plaintiff]. They are hers now." In further support of the donative intent Dr. von Kalinowski applied for and was issued on October 31, 1928, a travel insurance policy, naming the plaintiff as beneficiary, covering the transportation of the von Kalinowski baggage and jewelry on the pending return voyage to the United States. The policy provided total insurance coverage of 42,000 marks, of which 40,000 applied to "diamonds and jewelry."

6. In mid-October 1928 the plaintiff and her husband conferred with the American consuls in Frankfort and

Berlin, and with the Special customs Agent in Berlin, for the purpose of ascertaining whether the jewelry was dutiable under the customs laws of the United States. They were informed orally that the jewelry would not be dutiable because it had been inherited and not purchased, and that it could be admitted duty-free to the United States as personal effects. Following these conferences a consular invoice was applied for on October 10, 1928, by Dr. von Kalinowski, and was issued by the American consul in Frankfurt on December 21, 1928. The declaration accompanying the invoice was prepared on a "merchandise not purchased" form, and was signed by Dr. von Kalinowski as "owner" of the property to which it pertained described as "articles of jewelry, gold, silver and laces." The invoice stated that "These articles are inherited property of Professor Walter von Kalinowski from his mother who died in Wiesbaden, 8 April 1928 and who was Baronin Henrietta von Kalinowski, maiden name Pfaehler, Wiesbaden, Adolfsalee 31." The invoice stated the value of the articles to be 8,434 marks.

7. On November 3, 1928, Dr. von Kalinowski, accompanied by the plaintiff and their two children, embarked from Liverpool, England, arriving at New York on or about November 11, 1928. En route the jewelry and other valuables which he had inherited where left with the ship's purser for safekeeping, except for a ring which the plaintiff wore. It is not possible to determine from the record precisely what items were left by the Baronin's estate to Dr. von Kalinowski and brought by him to the United States, but at least several items of jewelry so inherited and imported do not appear in the list in the succeeding finding 8. Also

en route Dr. von Kalinowski made out a baggage declaration which declared a foreign value of 4,000 German marks for the jewelry and which, in accordance with custom, was collected before the ship docked and held for the use of the pier customs inspector assigned to inspect the declared baggage. The customs officials were fully aware, or should have been, that the property had been acquired by Dr. von Kalinowski by inheritance. The von Kalinowskis intended to retain the property for sentimental reasons as family heirlooms, and did not import them with an intention to sell them.

8. On arrival in New York the von Kalinowskis' baggage was opened for customs inspection. Discussions were had by them with various customs officials, including the Assistant Collector of Customs, there being some question as to what extent, if any, the inherited jewelry and effects would be dutiable. The valuables which Dr. von Kalinowski had inherited from his mother were examined by the inspectors and appraised by an examiner in consultation with a jewelry expert. On November 15, 1928, the customs officials released to the von Kalinowskis as duty-exempt a diamond brooch with matching earrings classified as "artistic believed to be over 100 years old," which they had appraised for customs purposes at $1,000, and which same items had been appraised at 925 German marks in the Baronin's estate inventory. The von Kalinowskis were given an opportunity to demonstrate, by affidavit or otherwise, that the other inherited valuables were duty exempt antiques, but they were without specific knowledge as to the age of the items. At the same time the von Kalinowskis were given their collective personal exemptions and allowances totaling $465 for the family of four persons (consisting of $30 allowance for wear, $35, allow-

ance for antique lace, and their $400 personal exemptions for which were released unidentifiable pieces of jewelry totaling that much in customs valuation), and the customs officials held for payment of $640 customs duty (computed at 80 percent) the following items of "jewelry old and used" which had been appraised for customs at $800:

	Reichsmarks
a. Man's ring of entwined snakes, with diamond and emeralds	
b. Ring with five large and various small diamonds	250
c. Marquise ring with four large diamonds, three sapphires, and small diamonds	230
d. Ring with pearl, emerald and diamond	400
e. Ring with three large diamonds, three rubies and small diamonds	400
f. Cameo brooch with diamonds	380
g. Diamond brooch with white sapphire and eighty small diamonds	600
h. Gold bracelet with diamonds in shape of star	550
i. Jewel box, bronze and ivory miniature	10
j. Gold-plated silver strainer and nine gold-plated silver Mocha spoons, each with a gold coin inserted, all in a box	9
k. Coral necklace	15
l. Pair earrings with two pearls, two large and six small diamonds	900
m. Two pieces of gold chain, one medal, one gold charm, three pearls, twelve small diamonds	3

The column of figures to the right of the foregoing schedule of items reflects the value, in then prevailing German marks, appearing in the original inventory of Baronin von Kalinowski's estate as reported by the appraiser in Wiesbaden, Germany, and is given here not as proof of value but as a possible indication of the value relationship among the various items. Item *a* in the enumeration was not in the Baron's estate, but was the property of Dr. von Kalinowski, having been willed to him by his father who died in 1905. The gold chain, charm and medal listed as part of item *m* in the above enumeration were not in the Baronin's estate but were the personal effects of Dr. von Kalinowski.

9. The von Kalinowskis were unable to pay at that time the $640 duty on the held items, and they were deposited in Public Stores, which is a Government warehouse and not a bonded warehouse.

10. In March 1929 the U.S. Customs officials, pursuant to plaintiff's request of the preceding month, authorized the plaintiff to manipulate the jewelry, *i.e.*, remove the gems from their mounts and reenter the stones separate from the mounts, which would have resulted in a substantial reduction of duty. The von Kalinowskis did not avail themselves of this opportunity, possibly because of the expense of dismounting and remounting, and the possibility of loss of the stones in the process.

11. On September 20, 1929, the plaintiff wrote to to the Commissioner of Customs that stringent financial circumstances prevented her from redeeming the jewelry detained since November 12, 1928, and that the period for its redemption would soon expire. She referred to the jewelry as family heirlooms of unknown antiquity inherited by her husband, made no explicit claim to the property as hers, and sought the Commissioner's intervention to secure an equitable adjustment of the problem. By letter the following month to Dr. von Kalinowski the Customs Service gave him a six-months' extension until April 1930 to redeem the jewelry by payment of the duty and informed him that the jewelry was being held in the U.S. Appraiser's Warehouse.

12. In February 1930 the jewelry was transferred to the U.S. Customs Seizure Room in Brooklyn, New York, in preparation for the ensuing spring auction of unclaimed parcels. At that time an Unclaimed Mer-

chandise Tag was prepared, the front of which bore in part the following data:

1 pkg.
1 assortment
jewelry
old and used

80% 180000 225000

In the ordinary course of procedure followed in such situations, absent error, this would be an abbreviated form of stating that imported merchandise valued at $1,800 for customs purposes was to be sold for non-payment of customs duty computed at 80 percent, and that the "domestic value" of the merchandise (which term was a meaningless fiction and was inserted simply because the regulations required it) was $2,250. On the reverse aside of the tag a sales employee of the customs service had written the following:

Jewelry old and used 80000
Jewelry artistic 0/100 $100000
$180000

Except for the total, this information on the reverse side of the tag was taken from the original baggage declaration and meant that old and used jewelry appraised at $800 was subject to 80 percent duty, and that artistic jewelry over 100 years old appraised at $1,000 was exempt from duty. Through an apparent error the total of the two, $1,800, was transferred to the front of the form as seen above by an unknown clerk, thus making it appear as stated above that jewelry appraised at $1,800 was to be sold for nonpayment of 80 percent duty, whereas actually jewelry appraised at $800 was to be sold for non-payment of the 80 percent duty amounting to $640. Normally the fictional "domestic

value" was computed by adding 10 percent to the sum of the appraised value and the duty, a somewhat arbitrary procedure which, however, did no harm because the "domestic value" figure meant nothing either to the customs officials or knowledgeable bidders, even though it was the only value which appeared in the catalog announcing the sale. The fact that $1,800 happens to be 80 percent of $2,250 is merely a coincidence and does not aid in determining the cause for the error which was made.

The plaintiff contends that the foregoing sequence of events established the fact that the property in suit was reappraised in February 1930, and that the reappraisal was made without the owner's knowledge, contrary to the requirement of regulations requiring notice, etc. There is in evidence as an admission against the defendant's interest a letter from the Acting Secretary of the Treasury stating that the property was reappraised at $2,250. On balance, taking into consideration the record as a whole, it is reasonably concluded that the information appearing on the Unclaimed Merchandise Tag was the product of error and that there had been no reappraisal of the property in suit.

13. On September 30, 1930, Dr. von Kalinowski wrote to the Assistant Collector of Customs expressing his intention to redeem the jewelry as soon as he could and stating further:

> While I was in Washington, I took occasion to look up the Commissioner of Customs, Mr. Eble. Mr. Eble was out of the city, but I had talk with Mr. Ashworth. I thought I might be able to obtain a little more information about my own case. Mr. Ashworth told me that three

years is the limit, before the Government sells what they called unclaimed parcels. In that case, I have still another year's grace, as I did not bring these jewels into the country until November 12, 1928. Will you kindly advise me at once in regard to this matter?

I will appreciate any extra time allowance you may grant me.

The reply of the Assistant Collector to the foregoing letter is not in the record, but it granted a further extension to April 1931 without commenting on Dr. von Kalinowski's inquiry as to whether he had another year's grace. Neither of the von Kalinowskis after receiving this incomplete response from the Assistant Collector made further inquiries as to the three year redemption period.

14. On March 19, 1931, the plaintiff wrote to the Assistant Collector requesting another six months' extension of time to redeem the parcel of jewelry on the grounds of inability to raise the required funds, and stating "I am aware that I have about exhausted your patience with persistent semi-annual requests and my time limit to redeem the parcel of jewelry as well." In his reply of April 8, 1931, the Assistant Collector stated to the plaintiff in part as follows:

> This merchandise was long since transferred to the Seizure Room for sale as unclaimed. However, it has been withheld from such sale upon your request. This office will give you a further extension of six months from date of this letter in which to claim this jewelry. However, in view of the lapse of time since the articles were brought into the United States, it will be impossible to extend this time any further.

15. On October 16, 1931, the plaintiff conferred with a Mr. Nagel, who was her friend and a former cabinet member under President Taft, and enlisted his aid in obtaining either another time extension or other dispensation. In her letter to Mr. Nagel of that date she advised him that "The time limit of three years will expire on Nov. 12, coming * * *." It is concluded that the plaintiff was honestly confused as to whether she had three years from November 12, 1928, within which to redeem the jewelry, although she was aware that October 8, 1931, was the expiration date of the final six months' extension which had been granted her by the Assistant Collector in the preceding April. The plaintiff knew also that sales of unclaimed parcels were held in April and October of each year.

16. On October 8, 15 and 22, 1931, the following notice appeared in both the New York Herald Tribune and the Journal of Commerce:

> Notice is hereby given that public auction of unclaimed goods will be held in the U.S. Customs Seizure Room, Army Base, 58th St. and 1st Ave., Brooklyn, on October 29, 1931, at 10 a.m. The goods may be seen from 9 to 3 on October 26 and 27. Catalogs will be mailed from the Seizure Room on October 22.
>
> Philip Elting, *Collector*.

In 1931 the circulation of the New York Herald Tribune was 292,164 and that of the Journal of Commerce was 25,283. The population of New York City at that time was 6,930,446. No personal notice of the proposed sale was given to the von Kalinowskis, although the Customs officials were aware of their address.

17. Under the columnar heading "value" in the catalog announcing the sale appeared the amount $2,250, the significance of which is discussed in finding 12. *supra*. The catalog listed, *inter alia*, in abbreviated form the items enumerated in finding 8, *supra*, except for item *l* in that enumeration, viz., pair earrings with two pearls, two large and six small diamonds. Prior to the sale this omission was discovered and was corrected by attaching to the page of the catalog used by the auctioneer at the sale a separate sheet itemizing the von Kalinowski jewelry including the earrings in question.

18. The auction sale was held as advertised on October 2[illegible] 1931, and the von Kalinowskie jewelry was bid in by various purchasers for the following prices totaling $880:

a. Man's ring of entwined snakes, with diamond and emeralds	$6.00
b. Ring with five large and various small diamonds	40.00
c. Marquise ring with four large diamonds, three sapphires, and small diamonds	70.00
d. Ring with pearl, emerald and diamond	15.00
e. Ring with three large diamonds, three rubies and small diamonds	20.00
f. Cameo brooch with diamonds	20.00
g. Diamond brooch with white sapphire and eighty small diamonds	165.00
h. Gold bracelet with diamonds in shape of star	300.00
i. Jewel box, bronze with ivory miniature	5.00
j. Gold-plated silver strainer and nine gold-plated silver Mocha spoons, each with a gold coin inserted, all in a box	42.00
k. Coral necklace	15.00
l. Pair earrings with two pearls, two large and six small diamonds	160.00
m. Two pieces of gold chain, one medal, one gold charm, three pearls, twelve small diamonds	22.00

The purchasers paid for and received delivery of their purchases on November 2, 1931. A net balance of $167.11 remained from the proceeds of sale after debiting the $640 in duty and $72.89 in expenses for storage, advertising and sale. According to defendant in

its requested findings, this $167.11 balance is still due the estate of the late Dr. von Kalinowski and has never been demanded.

19. The plaintiff's first actual knowledge of the October 29, 1931 sale came to her by means of a letter dated November 5, 1931, from her friend and representative, Mr. Nagel, who on November 2 (four days following the sale) had visited the Customs officials in New York on plaintiff's behalf. In this letter Mr. Nagel informed the plaintiff that he had requested the officials to ascertain whether some of the pieces sold could be retrieved from the purchasers. Subsequent efforts made by the Customs officials in this direction were unsuccessful.

20. In his letter to the Customs officials of December 4, 1931, Mr. Nagel stated in part as follows:

> The parties in interest had in mind the three year term, and thought they were within time when I called at your office. You were governed by the period of the last extension, copy of which I do not have before me. However that may be, I am rather surprised that notice of the proposed sale was not sent to the parties. They had manifested very keen interest in these articles, for reasons which are quite obvious. Although it may not have been necessary to advise them, it seems to me that such notice to them would have been only fair, and was certainly advisable, inasmuch as the purpose must be to get the best possible prices at a sale.

* * * * * * * *

Finally, I doubt whether any of these articles were really subject to sale. I am given to understand that the authorities are not quite clear upon that subject, and under these circumstances it would have been particularly desirable to have the parties notified, in order that they might protect themselves and might have given the authorities the advantage of acting with the consent of the parties in interest.

I state my impressions because it does appear to me that the result is most unfortunate, and gives the parties in interest a perfectly natural cause for complaint.

What their course will be I do not know, because I undertook to represent them merely by way of friendly assistance, prepared to pay the whole duty when I came to your office, if that were necessary. I do not expect to represent them professionally, but shall ask them to consult their own counsel about the matter.

21. In succeeding years considerable correspondence passed between the plaintiff or others in her behalf and the Treasury Department in a continuing effort by the plaintiff to secure redress. The following selected excerpts from some of these letters disclose the warring contentions of the parties:

a. Letter of January 21, 1932, from Customs Service to Honorable Charles Nagel, replying to latter's inquiry of December 4, 1931:

For your further information I quote as follows from Section 491 of the Tariff Act of 1930:

"Any merchandise of which possession has been

taken by the collector which shall remain in bonded warehouse or public store for one year from the date of importation without entry thereof having been made and the duties and charges thereon paid * * * shall be appraised by the Appraiser of merchandise and sold by the Collector at public auction."

You will note that the articles in question were legally disposed of under customs laws and frankly I cannot see how the parties in interest have any case for complaint as they were put on notice that the time limit of extension was definitely fixed as of six months from April 8, 1931.

b. Letter dated May 15, 1933, from Acting Commissioner of Customs to Honorable John J. Cochran, Member of Congress from Missouri, who had written on behalf of Dr. von Kalinowski:

As you no doubt know the duty on merchandise entered for warehouse is not required to be paid at the time of entry but is collected at the time of the withdrawal of the merchandise from the warehouse, the warehouse period being three years, that is, the merchandise may be withdrawn at any time within three years from the date of importation for consumption upon payment of the duty and charges, or for exportation without payment of duty, etc.

Since an application had been made for the manipulation of the jewelry which, as heretofore indicated, would have required a warehouse entry and since the application for manipulation had been granted by the Bureau prior to Mr. Kalinowski's

visit to the Bureau, the warehouse period of three years from the date of importation was possibly mentioned at that time.

* * * * * * * *

You are advised that all merchandise brought into the United States is duitable unless exempted from duty under some provison of law. The Appraiser found the jewelry in question not to have been entitled to entry free of duty.

There is no provison of law or regulation which entitled an importer to personal notification of the sale of any merchandise brought in by him which merchandise has become unclaimed and abandoned to the Government because the importer fails to comply with the requirements of the law and regulations to secure release of the merchandise from customs. At the time of sale of the jewelry a brief notice of the time and place of such sale for three successive weeks immediately preceding the sale in two newspapers of extensive circulation published at the port was required.

* * * * * * * *

The articles brought in by Mr. Kalinowski were sold under authority of Section 491 of the Tariff Act of 1922, the pertinent portion of which provides that if any merchandise of which possession has been taken by the Collector shall remain in bonded warehouse or public store for one year without entry thereof having been made and the duties and charges thereon paid, such merchandise shall be sold by the Collector at public auction as abandoned to the Government under such regula-

tions as the Secretary of the Treasury shall prescribe.

* * * * * * * *

The foregoing review of the case shows that Mr. Kalinowski was accorded every possible consideration and that the jewelry was finally disposed of by the Government as directed in Section 491 of the Tariff Act of 1922.

The Bureau regrets that it is unable to now aid Mr. Kalinowski.

c. Letter dated July 18, 1933, from Acting Commissioner of Customs to Honorable John J. Cochran:

With respect to Mr. Kalinowski's inquiry of how could it have been considered that he had abandoned the articles to the Government when he was in direct correspondence with the Customs office in New York during the entire period, and had expressed his intention of exporting the articles back to Germany rather than forfeit them to the Government, you are advised that because of Mr. Kalinowski's failure to perform all the conditions required to secure the release of the merchandise under Section 491 of the Tariff Act, the Collector was authorized and directed to sell the merchandise at public auction as abandoned to the Government. After the expiration of the one-year period, exportation of the articles in question was prohibited by Article 926 of the Customs Regulations of 1923, except on payment of the duty and all charges and expenses. Entry for warehouse under any condition was also prohibited by Article 926.

The one-year period referred to in Section 491 of the Tariff Act, and the three-year period mentioned in Section 557 of the Tariff Act, have no connection. Section 491 is applicable to merchandise which has not been released from Customs because the importer fails to take the necessary action to secure such release. Section 557 provides for a proper entry at the customhouse for a specific purpose, namely, storage in a Customs bonded warehouse for a period not to exceed three years, with all of the privileges given by Section 557 attaching.

* * * * * * * *

Mr. Kalinowski again states that the articles were sold without notice to him; that he never received official notice from the Collector of Customs at New York of the intention to sell, or that the articles were sold. As stated in the Bureau's letter of May 15, 1933, there is no provision of law or regulation which entitles an importer to personal notification of the sale of merchandise which has become subject to sale because of his failure to comply with the governing law and regulations. * * *

* * * * * * * *

With reference to your constituent's observation concerning the tariff classification of various of the articles sold it would appear that some of them might have been conditionally free of duty had proper claim been made on entry and appropriate proof furnished to show that the conditions for exemption from duty were satisfied. This is possibly true of the items referred to as 9 spoons,

1 strainer, and 1 medal. As no proper claim was filed, the conditionally exempt status of the articles, if it existed, does not affect the propriety of their sale.

Mr. Kalinowski's objections to the dutiable status of jewelry with personal associations and inheritances raise a question of Congressional policy. All articles imported into the United States have a value for customs purposes and are subject to duty unless specifically exempted therefrom, and no free entry is provided for heirlooms as such, nor for jewelry imported under the circumstances of this case.

Your constituent's opinion that a bracelet was denied free entry as an artistic antiquity because of its value is in error. The age, the artistic merit, and compliance with the customs regulations are the sole requirements for the free entry of antique jewelry, and value has no bearing upon the matter.

d. Letter dated October 7, 1933, from Commissioner of Customs to Honorable John J. Cochran:

Mrs. Kalinowski asks that the statement of the Bureau in its letter addressed to you on July 18, 1933, that "no free entry is provided for heirlooms as such" be explained. Neither the word "Heirlooms" nor its equivalent is used in the tariff laws, and it is accordingly impossible, under the law, to give consideration, in classifying articles for tariff purposes, to the fact that they may be heirlooms.

To further inform Mrs. Kalinowski, merchandise entered for warehouse is not held in the Ap

praiser's warehouse or public store, but must be stored in a warehouse, designated by the importer, bonded for the storage of imported merchandise generally. The Appraiser's warehouse or public store consists of premises owned or leased by the Government for the storage of merchandise undergoing examination by the Appraiser, under seizure, or pending final release from Customs custody, or merchandise awaiting sale as unclaimed.

22. Since the rejection of plaintiff's efforts to secure redress from the Customs Service as indicated in the preceding correspondence, the plaintiff continued in sporadic efforts to perfect her claim, culminating in her application for Congressional relief which resulted in the enactment of Private Law 85-364, 85th Congress, quoted in finding 1, *supra*.

23. Dr. von Kalinowski, plaintiff's husband, died intestate on October 12, 1942, at New Orleans, Louisiana, his last place of residence. There was no administration of his estate. He was survived by the plaintiff and her two sons, both of whom are attorneys at law and represented the plaintiff in the trial of this case.

Valuation

24. Judicial notice is taken that the official exchange rate of the German reichsmark in United States currency averaged 23.9154 cents in April 1928, 23.8143 cents in November 1928, and 23.8234 cents in October 1931. These rates appear in Table 173 on page 671 of an official publication of the United States Board of Governors of The Federal Reserve System entitled

Banking and Monetary Statistics published in 1943. The monthly averages are based on daily currency quotations on the New York market as gathered by The Federal Reserve Bank of New York and reported to the Secretary of the Treasury, who published them weekly as Treasury Decisions (see T.D. 42692, 42704, 42724, 42736, 43028, 43033, 43049, 43056, 45173, 45182, 45195, 45213, 45230).[1]

25. In presenting valuation evidence as to the jewelry in suit, which was not available for physical appraisal for reasons heretofore explained, the plaintiff relied primarily on the testimony of two witnesses. The first witness was a jewelry designer who drew sketches of each individual piece of the missing jewelry. The sketches were based upon the recollection of the plaintiff and the descriptions of the jewelry as contained in such documents as the inventory of the Baronin von Kalinowski's estate, early correspondence, the auction sale catalog, and certain other incomplete recordations by the Customs Service. Although the Customs Service was aware that the plaintiff was anxious to redeem the jewelry and had granted several extensions for this to be done, it never recorded a detailed description of the jewelry in anticipation of a possible post-auction claim, as prudence might have dictated. The plaintiff's second witness was an expert gemologist and jewelry appraiser who appraised the jewelry on the

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[1]At all times pertinent to this case there was applicable the provisions of 46 Stat. 739, § 522 (31 U.S.C. 372) under which the Secretary of the Treasury was directed to issue proclamations fixing the conversion rates of foreign currencies for the purpose of the assessment and collection of duties on imported merchandise. The effect of the rates so fixed is discussed in Staedtler v. United States, 25 C.C.P.A. (Customs) 130 (T.D. 49255), which cites in support Hadden v. Merritt, 115 U.S. 25.

basis of the sketches, the plaintiff's description, and other descriptions in the record, giving values for both 1931 and April 30, 1959. The appraiser assumed the gems to be genuine (conceded by the defendant), that the diamonds were average fair quality commercial white diamonds and not gem, or flawless, diamonds (the latter being 50 percent to 75 percent more valuable), and that the settings indicated an age of from 60 to 100 years so that his replacement cost estimates contemplated old-cut rather than new-cut stones, the latter being of greater value.

26. The composite table below shows as to each piece of jewelry, and as to the total, the appraised value as given in the inventory of Baronin von Kalinowski's estate, its value declared by Dr. von Kalinowski on his arrival in New York in 1928, the amount for which it was sold at the Customs auction on October 29, 1931, and the retail replacement cost (synonymous with fair market value) estimated by plaintiff's appraiser at trial both as of 1931 and April 30, 1959. Retail replacement costs of jewelry in 1931 were about one-half of those in 1959. The retail replacement costs for 1959 in the table below as provided by plaintiff's expert appraiser include a 10 percent Federal excise tax currently applicable to sales of jewelry, while those for 1931 do not since there was no such tax at that time. All replacement costs shown include a jeweler's markup over his cost of 50 to 60 percent, which is in keeping with the trade custom.

Item	Baronin's estate valuation as of April 1928		Declared value,	Auction sale,	Value per plaintiff's expert appraiser	
	Marks	Dollars	1928	1931	1931	Apr. 30, 1959
a. Man's ring of entwined snakes, with diamonds and emeralds[1]				$6.00		
b. Ring with five large and various small diamonds	250	59.79		40.00	$4,545.46	$10,000.00
c. Marquise ring with four large diamonds, three sapphires, and small diamonds	230	55.01		70.00	8,181.82	18,000.00
d. Ring with pearl, emerald and diamond	400	95.66		15.00	681.83	1,500.00
e. Ring with three large diamonds, three rubies and small diamonds	400	95.66		20.00	2,954.55	6,500.00
f. Cameo brooch with diamonds	380	90.88		20.00	500.00	1,100.00
g. Diamond brooch with white sapphire and eighty small diamonds	600	143.94		165.00	5,000.00	11,000.00
h. Gold bracelet with diamonds in shape of star	550	131.53		300.00	6,818.19	15,000.00
i. Jewel box, bronze and ivory miniature	10	2.39		5.00		
j. Gold-plated silver strainer and nine gold-plated silver Mocha spoons, each with a gold coin inserted, all in a box	9	2.15		42.00		
k. Coral necklace	15	3.59		15.00		
l. Pair earrings with two pearls, two large and six small diamonds	900	215.24		160.00	1,500.91	3,500.00
m. Two pieces of gold chain, one medal, one gold charm, three pearls, twelve small diamonds	3	.72		22.00		
Totals	3,747	896.11	[2] 952.04	880.00	[3] 30,272.75	[3] 66,600.00

[1]This ring was not part of the Baronin's estate inventory.

[2]Converted from 4,000 mark's @ $0.238234 per mark.

[3]No appraisals for items *a*, *i*, *j*, *k* and *m*. Note also that the 1931 appraisal is without Federal excise tax, since there was none at that time, while the 1959 appraisal includes 10 percent Federal excise tax.

27. In finding a fair market value as of October 1931 for the plaintiff's jewelry, etc., sold at auction in that month, several factors have been considered along with the data in the above table, viz:

a. It will be noted that items *b*, *c*, *d*, *e*, *f*, *g*, *h*, and *l*, which plaintiff's expert valued at $30,272.75 as of October 1931, realized a gross of $790 at the Customs auction, or only 2.61 percent of the appraisal by plaintiff's expert. Appraisals by Customs for purposes of duty are extremely low, somewhat analogous to appraisals for inheritance or estate tax purposes where the taxpayer is given the benefit of a valuation substantially less than market value. Sales at auction are in the nature of distress sales and thus the prices brought are normally substantially less than market value. Judicial knowledge cannot be taken of the percentage less than market value either of property sold at auction or of the Customs appraisals, and the record does not provide such a figure. The valuations provided by plaintiff's expert are deemed to be unrealistically high, due not to the expert's lack of capacity or candor, but to his lack of opportunity to examine the jewelry.

b. There were released to the von Kalinowskis in November 1928 as antiques a brooch and earrings appraised by Customs at $1,000, but which had been appraised at 925 marks ($220.29 at the contemporaneous official exchange rate) in the German inventory of the Baronin's estate, which, assuming the inventory appraisal to have been correct, would have represented an exchange ration of $1.08 per mark for the purpose of that transaction. On the other hand the Customs officials had appraised at $800 those items held for

sale which had been valued at 3,710 marks in the German inventory of the Baronin's estate, which, again assuming the inventory appraisal to have been correct, would have represented an exchange ration of $0.215 per mark. There is thus a basic and unexplained inconsistency in the disparate valuations given by Customs to that property which was sold at auction and that which was released to the von Kalinowskis as duty-free antiques. It is probably true that the valuations given in the German inventory of the Baronin's estate were substantially low because quite commonly valuations given for estate tax purposes are leniently low, but it could be fairly assumed that the separate valuations in the inventory bore a reasonably correct relationship to each other and were no further away from reality than the Customs appraisal prices on the one hand and the values fixed by the plaintiff's expert witness on the other. It is obvious that the amounts received at auction were substantially below fair market value, but it is not worthy of credulity that the fair market value was 38 times that of the Customs appraisal, as plaintiff's expertise would indicate. This is particularly true when consideration is given to the fact that, prior to leaving Germany to return to the United States in 1928 the plaintiff's husband insured the same items for $9,525.72, the domestic equivalent of 40,000 German marks. It may be reasonably assumed that in procuring baggage insurance for the trip Dr. von Kalinowski fixed an insurance valuation at least equal to, and probably in excess of the fair market value of the items at that time. Since there were released to the von Kalinowskis by Customs agents upon their arrival in New York jewelry and laces in the total value of $1,400 as appraised by

Customs, deducting this sum from $9,525.72 would leave $8,125.72 as the maximum value of the items which were sold by Customs for $880, according to the plaintiff's admission as represented by the baggage insurance policy.

28. It is thus found that the fair market value of the items of personal property in suit which were sold at the auction sale in October 1931 for nonpayment of duty was, as of that time, $8,125.72. This figure includes the $167.11 stated in finding 18, *supra*, to be the net balance from the auction sale proceeds credited to Dr. von Kalinowski and never paid to or demanded by him or his heirs since.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and it is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of eight thousand, one hundred twenty-seven dollars and seventy-two cents ($8,127.72).

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No. 202

In the Supreme Court of the United States

OCTOBER TERM, 1961

MRS. WALTER E. VON KALINOWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion and findings of the Court of Claims Commissioner are set forth at Pet. App. B, p. 4. The opinion, findings of fact and conclusion of the Court of Claims (Pet. App. C, p. 43) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on November 2, 1960. A timely petition for rehearing was denied on April 7, 1961. The petition for a writ of certiorari was filed on July 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims adequately compensated petitioner for the alleged liability of the United States for certain goods sold by United States customs authorities for nonpayment of duty.

STATUTE INVOLVED

Act of March 15, 1958, Private Law 85–364, 72 Stat. A–15:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding any statute of limitations or lapse of time or any limitation upon the jurisdiction of the United States Court of Claims to hear, determine, and render judgment on claims against the United States, jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment upon the claim of Mrs. Walter E. von Kalinowski. Suit upon such claim may be instituted by Mrs. Walter E. von Kalinowski at any time within three years after the date of enactment of this Act.
>
> SEC. 2. The provisions of sections 1492 and 2509 of title 28, United States Code, shall be applicable to this Act.
>
> Approved March 15, 1958.

STATEMENT

This suit was brought in the Court of Claims pursuant to a special jurisdictional act, Private Law 85–364 (*supra*), authorizing the Court of Claims to hear, determine and render judgment on plaintiff's claim

for the value of certain jewelry and other effects sold at a customs auction in 1931 for nonpayment of duty.

Plaintiff and her husband, Dr. von Kalinowski, received the property in June 1928 in Germany from the executor of an estate. The appraised value of the property as given in the inventory of the estate was $896.11. The value of the property as declared in 1928 by Dr. von Kalinowski on arrival in New York was $952.94. (Pet. App. C, pp. 76–77). It was appraised in November 1928 by the customs agents at $800 and held for payment of $640 customs duty computed at 80 percent (Pet. App. C, p. 60).[1] The von Kalinowskis were unable to pay the $640 and the property was deposited in a government warehouse (Pet. App. C, p. 61). After considerable communication between the parties, and repeated extensions of time within which the property might be redeemed, it was sold at auction for $880 on October 29, 1931.

The plaintiff sued for $93,725.00, claiming that the property was exempt from duty and that the sale was void because of procedural defects. The government denied these contentions and further claimed that the plaintiff was not the owner of the property. The court held that certain small items were non-dutiable as they qualified under the exemption for "household effects" (Pet. App. C, p. 48);[2] that the sale by the defendant was invalid because the defendant failed

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[1] Tariff Act of 1922, Par. 1428, 42 Stat. 917.

[2] Tariff Act of 1922, Par. 1531, 42 Stat. 925. See also Article 382 of the Customs Regulations of the United States (ed. 1923), (Government Printing Office, 1929).

to comply with certain requirements for notice of the sale (Pet. App. C, p. 53); that plaintiff was the owner of the property (Pet. App. C, p. 54); and that the defendant was liable to the plaintiff in the amount of $8,125.72, based on the fair market value of the property as of October 1931, the date of the sale (Pet. App. C, p. 55). Plaintiff contends that the value of the property and the court's award should have been based on the highest value between the time of sale (Oct. 1931) and the time of trial (May 1959); and that the value should be adjusted upwards because of the diminishing value of the dollar and because of the sentimental value of the property to the petitioner. The petition seeks this Court's review of these contentions.

ARGUMENT

The petition has advanced no proper basis for the exercise by this Court of its certiorari jurisdiction. The case arises under a special jurisdictional statute, and the decision rests on the particular facts involved and the evidence relating thereto. The case does not present a question of general or public importance warranting review by this Court. Furthermore, if anything, the Court of Claims award is excessive rather than inadequate.

1. Petitioner's contentions in this Court all relate to the measure of damages employed by the Court of Claims. But that court sought to apply what is generally recognized as the proper standard for evaluating damage to or loss of personal property, the fair market value of the property as of the time the injury took place. 2 Sedgwick, *Damages* (9th ed.

1912) 962–64. That has been the rule applied by this Court since at least 1888, see *Galigher* v. *Jones,* 129 U.S. 193, 200, and it is the law in the State of New York, where the alleged wrong in the instant case took place. *E.g., Mechanics & Traders' Bank* v. *Farmers & Mechanics' Nat'l Bank,* 60 N.Y. 40, 52.

In urging that she is entitled to the highest market price that the property might have had up until the date of trial, petitioner attempts to rely on the "rule of highest intermediate value"; however, that rule is simply not applicable to petitioner's case. In the first place, that rule, as stated by both this Court, *Galigher* v. *Jones, supra,* 129 U.S. at 200–202, and the New York Court of Appeals, *Baker* v. *Drake,* 53 N.Y. 211, 216–17, is applicable only for determining damages with respect to property of widely fluctuating value, such as stocks and commodity futures. See 2 Sedgwick, *op. cit. supra* at 1007–1008, 1009–1011. It is plain from the context of the decided cases that the value of property cannot be said to "fluctuate" for the purpose of this rule simply because there is a general increase in the cost of living. And yet, as far as appears from this record, the alleged increase in the value of petitioner's property is not attributable to anything but the overall rise in the cost of living in the thirty years since 1931.

In the second place, even if petitioner's property could be considered as "property of fluctuating value" within the reach of the rule, the decisions of this Court and the New York courts have established that the period of time within which the "highest intermediate value" may be claimed is sharply limited. The

owner of such property is entitled to benefit only from increases in value that take place within "a reasonable time after the owner has received notice" of the injury or loss to the property. *Galigher* v. *Jones, supra,* 129 U.S. at 201–202; *Smith* v. *Savin,* 141 N.Y. 315, 36 N.E. 338; 2 Sedgwick, *op. cit. supra* at 1007–1009. And where, as here, there is no evidence that the value of the property was any different a reasonable time after the loss from what it was at the time of the loss (or notice thereof), there is no basis for applying the rule at all. *Griggs* v. *Day,* 158 N.Y. 1, 22–23, 52 N.E. 692, 698–99; 2 Sedgwick, *op. cit. supra* at 1007.

Petitioner does not seem to dispute that, in passing the special jurisdictional statute on which her claim was based, Congress intended to do no more than to waive the statute of limitations and the defense of laches. See, *e.g., United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 162–163. Thus, it was the purpose of Congress to assure petitioner of whatever recovery she would have been entitled to had she brought her suit within the period of limitations allowed by the applicable statute. There is certainly no indication of any intention on the part of Congress to put her in any better position than she would have been had she sued within the statutory period, and in view of the long-standing doctrine that special jurisdictional statutes "are to be strictly construed," *United States* v. *Goltra,* 312 U.S. 203, 210, no such intention should be inferred.

Since the alleged increase in the value of petitioner's property results, so far as appears from the record,

solely from the general rise in the cost of living, the foregoing discussion applies equally to petitioner's contention that the amount of the damages should be increased to take account of the declining value of the dollar. Petitioner would have the Court announce novel doctrine; she is able to cite no case decided by this Court or any other federal court, nor by any New York court, sanctioning the injection of "diminished purchasing power" as an element of damages.[3]

2. Although the United States has not itself petitioned for a writ of certiorari, should the instant petition be granted the Government reserves the right to demonstrate that the award of $8,125.72 is unwarranted and excessive, rather than insufficient. Since the property was actually sold on the market for $880, the judgment of the court as to the market value of the property appears clearly excessive, particularly in the light of the declared value of $952.94 and the appraised value of $800. Indeed, the court recognized the probable excessiveness of its findings; it based its determination of value on the amount specified in a baggage insurance policy to cover the transportation of the property from Germany to the United States, which valuation was "at least equal to,

[3] Petitioner seems to recognize that her contention in favor of additional damages for the special value of the property as family heirlooms would not warrant a grant of the writ of certiorari (Pet. 18). Such an element of value is so vague and uncertain that even petitioner has been unable to specify any money equivalent. In any event, the manifest overevaluation of the property by the Court of Claims, discussed below, must be assumed to have taken account of such elusive factors of value.

and probably in excess of the fair market value of the items at that time" (Pet. App. C, p. 79).[4]

Furthermore, since the property in question was dutiable[5] and the then-applicable duty on this property was 80 percent of the market value of the property,[6] the duty on property of a market value of $8,125.72 would be $6,500.58. Thus, even if the court's determination of market value were accepted, the damage to petitioner would be a little over $2,500, after deducting the applicable duty from the market value and crediting petitioner with the proceeds of the sale.[7]

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[4] Insurance policies are generally regarded as questionable sources of evidence as to market value. *Adelphia Hotel Co.* v. *Providence Stock Co.*, 277 Fed. 905 (C.A. 3); *Union Pac. R. Co.* v. *Lucas*, 136 Fed. 374 (C.A. 8).

[5] The items found to be not dutiable represent an insignificant part of the property involved (Pet. App. C, pp. 47–48, 77). They were sold for $47, or slightly over 5 percent of the $880 for which all the property was sold.

[6] Tariff Act of 1922, Par. 1428, 42 Stat. 917.

[7]

Market value of articles sold		$8,125.72
Statutory customs duty (80%)	$6,500.58	
Proceeds of sale credited	−880.00	
Balance of customs duty due		−5,620.58
Net damage to petitioner		$2,505.14

Presumably some small adjustment would have to be made for the items found by the court to be duty-free. See note 5, *supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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